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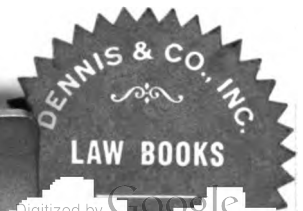
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FOREWORD

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THE BAR
(West Virginia)
Volume 17

1910

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Buffalo, N. Y.
May, 1963

DENNIS & CO., INC.

JANUARY, 1910

THE 

BAR

"The world is being politically organized while we are talking about it and wondering how it is to be done and when it is to come to pass. Little by little the steps are taken, now in the formulation of a treaty, now in the instructions given to representatives at an international conference, now in the new state of mind brought about by the participation in international gatherings and the closer study of international problems, until one day the world will be surprised to find how far it has traveled by these successive short steps. We need not look for any great revolutionary or evolutionary movement that will come suddenly. A revolutionary movement would not be desirable, and evolutionary movements do not come in that way. Slowly, here a little, there a little, line upon line, and precept upon precept, will the high ethical and political ideals of civilized man assert themselves and take on such forms as may be necessary to their fullest accomplishment."

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St. Paul, Minn.

THE BAR

VOL. XVII.

JANUARY, 1910

No. 1

THE BAR

OFFICIAL JOURNAL OF THE

WEST VIRGINIA BAR ASSOCIATION.

Under the Editorial Charge of the
Executive Council.

Published Monthly from October to May.

Bi-monthly from June to September.

Entered as second class matter August
11, 1904, Postoffice, Morgantown,
W. Va., under the Act of
Congress March 3rd, 1879.

Price, per Copy.....\$.10
Yearly, in Advance.....\$1.00

ADVERTISING RATES ON REQUEST.

All Circuit Clerks are authorized
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Address all communications to
THE BAR.
Morgantown, W. Va.

AN OPEN FORUM.

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This journal is intended to furnish an open forum to every lawyer for the discussion of any policy or proposition of interest to the Profession. It invites a free interchange of views upon all such topics whether they agree with the views of THE BAR or not.

THE BAR goes to every court house in the State, and is read by, probably, three-fourths of the lawyers of the State, and thus furnishes not only a ready medium of communication between members of the Profession, but of unification of the Profession on all matters of common concern, which is its prime mission.

Every clerk of a circuit court is the authorized agent of THE BAR in his county, and has the subscription bills in his possession, and will receive and receipt for all money due on that account, or for new subscriptions, and his receipt will always be a good acquittance for money due THE BAR.

THE BAR is furnished at the nominal rate of \$1.00 a year, which is less than the cost of publication, and we would like to have the name of every lawyer in the State on our subscription list.

We now appreciate the foresight of the mother who some-time ago named her new baby, George-Frederick-Cook-Peary, saying that she wasn't going to take any chances!

What a boon it would be to have only an authoritative judicial officer to take depositions, who would be responsible for the maintenance of discipline and the reception or exclusion of testimony?

The Bar extends the compliments of the season to the Fraternity as a body, hoping that for each one the year 1910 may contain full 365¼ days, good measure, pressed down, shaken together, and running over.

Those who think there is too great a limit given to the right of appeal under our judicial system, will probably change their minds if they will look at the number of reversals in the list of cases reported in this Bar. And this list is not exceptional, but shows the usual proportion.

About the only point the peacemakers agree upon by way of abolishing war, is to encase themselves in armour. Every new battleship makes them bubble over with enthusiasm for peace. Every Congressman is ready to vote millions for the implements of war because he is a man of peace. It reminds us of the whiskey-soaked toper who was in favor of prohibition, "but agin its enforcement."

New Jersey is the first state to try a definite reformation of its courts. Five of the ablest lawyers in the state prepared the scheme. The State Bar Association endorsed it. The legislature approved it. The Judges and Lawyers of the State conducted a campaign for its adoption. The press

of the State advocated it. And the voters defeated it by a decisive majority.

A Kentucky editor referred to one of his constituents, the other day, as a "peacock," whereupon the peacock strutted into the editorial sanctum and broke a cane over the editor's head. Following this incident promptly, the Governor of Kentucky granted the peacock a full and free pardon for the act. And as a final scene in the play the editor seeks to impeach the Governor for malfeasance in office. That's the way they do things in old Kentucky.

We don't believe in a boycott. It's a very mean way to vent a spite. But we are in a mood to lead a boycott against the newspapers who print the first part of an article on the first page and the last part of it on some other page. That's the meanest, most exasperating thing a newspaper ever does. If a boycott is ever justifiable it is against that thing. There is a splendid opening for a newspaper which will be decent in its make-up. Everybody wants to subscribe for it.

Dr Osler once told a company of medical students the master word of life—the word which is the open sesame to every portal, the great equalizer in the world, the true philosopher's stone, which transmutes all the base metal of humanity into gold—the word which makes the stupid bright, the bright brilliant, and the brilliant steady, the word in the heart which makes all things possible, and without which all is vanity and vexation, the word which brings hope to the youth confidence to the middle-aged, repose to the aged. That master word is work; and if in the period of youth it is written on the heart and bound on the forehead, all will be well.

We believe that advice is even more pertinent to the legal than the medical profession.

A recent New York decision makes a point of interest to a great many people at this time of the year.

It charges the management of large and small financial institutions with a new responsibility in accepting checks drawn by an officer of a corporation as such and deposited by him to his private account. The court holds that in such a transaction it is the duty of the bank receiving such a check for deposit to make inquiry as to the regularity of the proceeding, and that a bank accepting such checks and paying out money on them to the personal benefit of the officer who drew and deposited them is liable to the corporation on whose funds the officer has drawn if reasonable inquiry would have revealed the unlawfulness of the officer's action.

THE MAKING OF CITIZENS.

A contemporary notes that Justice Nathan Miller of New York recently gave lawyers and others in his court somewhat of a surprise by flatly refusing all applications for citizenship. He declined to give papers to any applicant who was not able to show sufficient knowledge of the Constitution of the State to be able to cast an intelligent vote. It is a singular commentary that such action on the part of a judge should provoke any comment whatever, for it should be the usual instead of the exceptional thing. Altogether too much laxity has been shown in the making of new citizens. To give the electoral franchise to those who are ignorant of the principles of the government under which they are to live is to foster electoral crime. To use the apt words of Justice Miller: "An ignorant electorate tends to be a corruptible electorate; an unintelligent use of the ballot is dangerous to the success of a democratic form of government." Now if all the other judges who are charged by law with the duty of passing upon this class of applications will exercise similar severe scrutiny—and the severer the better—we may soon witness a most desirable reform in the making of new citizens.

A GOOD PRECEDENT.

One of the judges of a New York court has announced a new departure in the appointment of the "pick of the bar" to defend persons under indictment for crime, who are too poor to employ counsel.

Carrying out this policy the judge recently called upon Wm. B. Hornblower, DeLancy Nicoll and Samuel Untemyer to conduct the defense in three murder cases.

It is greatly to the credit of these eminent lawyers and to the legal Profession, that they each, accepted cheerfully and without any begging off.

Moreover one of the cases, that to which Mr. Untemyer was appointed, has already been tried and his client acquitted. The court was not stingy in its allowance of a fee. It awarded the attorney \$1,500. He said that it had cost him \$1,000 to prepare the case, and he would give the other \$500 to some charitable purpose.

In other words, while Mr. Untemyer does not seek a criminal practice he recognizes the true attitude of a member of the profession to a case like this. He well says:

"As soon as we realize that the defense of life, liberty and reputation is more important to the community than the mere championship of money interests, there will be a change for the better. In every civilized country except our own the leaders of the bar are proud to be selected to defend life, liberty and reputation, while, strange to say, it has grown to be almost a reproach in this city to find a man engaged in the practice of criminal law, however upright and able he may be. As a result we are to-day, of all the great cities of the world, without a recognized leader at the criminal bar. What a contrast to the days when men like Hamilton, Webster, Beach and Fullerton were proud of the distinction!"

Moreover if the traditions of the profession are to be maintained, what higher obligation can rest upon the lawyer

than to go to the defense of the defenseless, without money and without price.

We need a reformation on both sides of the criminal business of our court, the prosecution and the defense.

It is time the State was recognizing the propriety of electing to the high and responsible office of State's Attorney, men of professional ability, experience and character, who would conduct the State's business with good judgment and discrimination—bringing the guilty to punishment and seeking to protect the innocent as well.

The policy of putting a young student of the law, without experience and often without capacity, into the office of prosecutor, to be educated at the State's expense, is a parody on the administration of the law.

THE DIFFERENCE.

The New York Outlook, of which ex-President Roosevelt is now one of the editors, makes a very just and accurate characterization of the chief trait which marks the difference between the administration of Mr. Roosevelt and his successor, Mr. Taft:

"When a desirable course of action was proposed to the Roosevelt Administration, the proposal was met with the question, 'Is there any law against it?' 'No!' 'Then go ahead and do it.' If it is proposed to the Taft Administration, the proposal is met by the question, 'Is there any law for it?' 'No!' then we must ask Congress for a law.' "

It can only be said that one Administration is more eager, the other more cautious; one puts greater emphasis on results, the other on methods; one is impatient to achieve, the other waits to consider; one assumes authority if it has not been denied, the other assumes no authority until it has been granted; one is Napoleonic, the other Fabian; one is militant, the other legal; both seek the same end, both are

progressive, both approve the proverb, "Make haste slowly," but one lays the emphasis on "haste," the other on "slowly,"

The most significant thing about this characterization is that it is made to commend and defend the Roosevelt idea.

A GOOD JOB.

Some criticism has been made of President Taft's first appointment to the U. S. Supreme Bench.

Judge Lurton is 65 years old, and it is said that he is of the age to retire and not to begin an official term.

These critics would select a young stripling to rollick around in one of the highest offices of the nation until he could be educated into the responsibilities of the position, trusting to the chances that he might ultimately measure up to its supreme demands.

If there is any office in the nation that ought not to be made the play of experiment, of youth, of inexperience, of mediocre ability, of immature judgment and uncertain ability, it is a judgeship either on the Supreme bench or any other bench.

The man who occupies that position ought to be the ripest lawyer, the most accomplished and trusted character among the citizens of the Republic. We have no patience with that policy that would put a man on the bench to be educated. This is the age of the young man, but his place is not on the bench.

President Taft ought to know a judge when he sees him, and in our judgment he has made one of the most judicious appointments in Judge Lurton, that has ever been made to that court. He takes a mature judgment, a ripe experience, and a high character to that exalted office, and it is no place for any smaller man. If he serves the country for five years only it is worth while to have him.

OUR BREAD AND BUTTER.

The Secretary of Agriculture tells us that the value of the products of Uncle Sam's farm for 1909 is no less than \$8,700,000,000. He says "the crop is worth as much as the gold and silver coin issued by the United States, plus the billion in the treasury vaults." But we will bet dollars to peanuts that we pay more for our bread and butter this year than any other year in our history, and more than in any other country in the history of the world. We will go to market with our money in a basket and bring the purchase home in our vest pocket.

In the language of Mr. Dooley, "Where are we now!"

The Consumer is on the griddle, and is being toasted to a brown. He squirms but never squeals. He is the most tolerant person since Job.

The President draws on his statesmanship to explain that we have more people than ever before, and we are mining more gold than ever before.

These explanations may explain, but they are not entirely satisfactory when his agricultural colleague in the cabinet tells us that the butcher is pocketing 38 per cent on his meats, and the farmer is selling his buttermilk at the regular price of cream; that everybody is getting rich but the consumer. The Congress is called together in special session to revise the tariff in the interest of the consumer and when the friends of this measure have finished the job, prices go up another notch. Now we have had a revision by the friends of a tariff, and the protected interests continue to pocket the protection while the consumer pays the freight. How would it do to have a revision by the enemies of a tariff with a provision that the price of protection be deducted from the price of the article to the consumer. It is said to be a good rule that works both ways.

JUDGE DOOLITTLE'S ARTICLE.

A very remarkable paper appears in this number of **The Bar**—remarkable for its frankness and courage—by a very well-known and popular judge.

We knew that such a paper was dormant in the pigeon hole of a member—we ought to say members—of the judiciary of West Virginia, and we have been poking about to find one with the courage of his convictions, to bring it out.

Now we have it. And there are more.

Judge Doolittle, says in a private note, that he “hopes his article will be useful in attracting the attention of critics who may, by way of reply, contribute better articles to **The Bar**.

We shall be disappointed if his article does not encourage other judges who are of a like mind, to come to his support and align themselves frankly on the side to which they belong.

The bar of the state is interested in knowing how far the judicial timber of the State is impregnated with this insidious disease. We happen to know that there is a large complement of the membership of the bar of this State, the individual members of which believe, each for himself, that his particular Judge before whom he chiefly practices, is a practical exponent of the new religion, to-wit: that a Judge is more or less a law unto himself—and that individual lawyer is under the impression that he is having an exceptional experience, and that other judges are not so.

We also happen to know that its almost impossible to find a judge who believes in and practices this new religion on the bench, who, like Judge Doolittle, is unafraid and willing to openly avow and maintain his faith.

Therefore **The Bar** is interested in disclosing the situation as it is. We would like the Profession to know “where we are at” on this question. And we are glad to have Judge

Doolittle's paper as making a bold, square issue on what we believe to be the most vital question that concerns the judicial system of the State—that concerns ultimately the very existence of our judicial system. For if Judge Doolittle's position is correct, then it is only a question of time until the judicial absorbs the legislative department of our government, and the legislative department will have to surrender or fight.

At some future time we want to have a little argument with Judge Doolittle in these pages—we have some leading questions we desire to propound, and being of a liberal mind, he will not overrule a leading question; and neither will he lack the courage to answer them.

Just now we are interested to have some comments from the Profession. **The Bar** is wide open to anyone who desires to discuss this subject.

THE SUPREME GIFT.

Man has no wings, and yet he can soar above the clouds. He is not swift on foot, and yet he can outspeed the fleetest hound or horse. He has but feeble weapons in his organization, and yet he can slay or master all the great beasts. His eye is not so sharp as that of the eagle or the vulture, and yet he can see into the farthest depths of sidereal space. He has only very feeble occult powers of communication which his fellows, and yet he can talk around the world and send his voice across mountains and deserts. His hands are weak things beside a lion's paw or an elephant's trunk, and yet he can move mountains and stay rivers and set bounds to the wildest seas. His dog can outsmell him and outrun him and outbite him, and yet his dog looks up to him as to a god. He has erring reasons in place of unerring instinct, and yet he has changed the face of the planet.

Without the specialization of the lower animals—their

wonderful adaption to particular ends, their tools, their weapons, their strength, their speed—man yet makes them all his servants. His brain is more than a match for all the special advantages nature has given them. The one gift of reason makes him supreme in the world.—Atlantic Monthly.

THE OUTLOOK FOR REVISION.

The outlook justifies the belief that in the very near future there will be a very radical reorganization of our courts and system of practice.

President Taft is committed to this movement and he seems very active and intent on accomplishing it. The Congress has already taken it up and several bills are under way to this end. The bar associations are working along this line. The law journals are making it a specialty. The newspaper press and the people are a unit in demanding it.

The only influence that one would expect to see most active and interested for or against the movement is that of the individual members of the bar. With a few notable exceptions here and there over the country the average lawyer is quiescent and passive—just as he has always been and always is strangely, about the defects and defeats in our system which he meets in every-day practice.

It is a movement appealing specially to the members of the legal Profession, and requiring too, their knowledge and experience to frame any intelligent and efficient system of legal procedure. Yet we are not sure that all lawyers of experience and ability would be wise in such a work. History shows that they are not. And the average layman is a bull in a china shop when dealing with such a matter. Altogether the situation presents a most important and delicate work, demanding the most expert and skilful workmen, who are not on the job, while everybody is tinkering with it, and every blunderbus thinks he is equal to it, and there is a consequent

menace that one department of the government will be thrown into "confusion worse confounded."

The chief evils of our existing system which President Taft attacks, and which everybody recognizes as the just basis of the universal criticism, are the delays and excessive costs of litigation.

There is no business that could live in this day of the world, that would cling to the methods and movements of a past century. It could not meet the demands of the new order of things, of a new era and entirely new conditions. It would be buried and obliterated under a cloud of ridicule. Nevertheless that is the relative attitude of our courts. Everything has advanced and improved its pace but the courts. They alone stand still, hedged in by a barrier of hoary precedents so venerable and venerated that seemingly no lawyer who values his reputation has had the temerity to attack them. It has required a national sentiment and a national revolution to bring about the outspoken universal demand for a change.

And now that we are all in agreement as to the deficiencies of our judicial system, the important concern is to agree upon the remedies. We do not believe that the remedies proposed by President Taft will obtain the endorsement of the legal Profession. They may be pushed through the lower house of Congress as a kind of political, or administration measure, but the lawyers of the Senate will give them check. Nor do we believe they would be acceptable to the country if put into practical operation. They are very radical in their nature, and eliminate some features of our judicial system that the people will not consent to part with—notably the free right of appeal. In fact there is, as yet, no comprehensive proposition or substitute for our existing system that has met with general approval or struck the popular sense.

It has been well said that any improvement in legal procedure is to be brought about by vigilance at every point, and

not as the result of any special fad which is expected to give universal and perpetual relief. It may also well be said that any sweeping comparison between procedure in England and procedure here, which puts our courts generally at a disadvantage, is far from justifiable. The English courts have certain habits which would not be tolerated in this country; and, moreover, some are now becoming choked with business, so much so as to cause great complaint. Parliament has also been compelled by a sense of justice to give in criminal cases a universal right of appeal, which theretofore depended on the discretion of the Attorney General. There are existing evils, as there always are in all human matters, which can be remedied, and there will be new evils springing up in lieu of those now existing unless vigilance is constantly exercised in all directions.

A VERY FRANK AND HONEST AVOWAL OF JUDICIAL HETERODOXY.

An Interesting Manifesto by Judge Doolittle of Huntington, W. Va.

TO The Bar:

"What are the true limitations of a Judge in dealing with a law, precise in its terms, that is harsh and impolitic in its practical application to a particular case?"

The management of **The Bar**, requests me to contribute to this periodical an article setting forth my views on this question.

It is a practical question frequently arising to perplex the Judge in the administration of justice.

What are his true limitations in rendering lawful decisions between man and man? Must he always follow the way as blazed by the Legislature or by former judges, regardless of the fact that a logical decision, in the light of authority, will

actually work injustice? Or can he reasonably hold that, notwithstanding the precise terms of a statute, "the law leaves something to the discretion of a just and wise judge," and permits him to render a decision which will be in accord with the reason and spirit of the enactment, and which he may reasonably suppose would have been according to the letter, had the Legislature foreseen the occurrence of the case as developed on the trial?

Having in mind the fact, that my practice on the bench, has not always been in accord with the strict rules of theoretical law-writers, (logical enough from their standpoint), an other question arises,—Is the professor spreading a net for my feet?

The theory of these writers is that an impartial judge will strictly apply the statute, as he finds it, to all who violate its terms or come within its provisions. Such writers will perhaps admit that a law is bad in its application to a particular case; and still they will insist that the judge has no discretion in the premises, but must apply the law as declared or enacted.

They quote with approval the opinion of President Grant, that the best way to get rid of a bad law, is strictly to enforce it.

One distinguished jurist and writer deplores the loose application of laws by municipal authorities, and ridicules the idea that changed conditions and circumstances of civic communities should ever make any difference in the application of laws and ordinances.

He says, that such judicial rulings remind him of the modern minister who changed the lines of the old hymn,—

"O, may my heart in tune be found;
Like David's harp of solemn sound;"

so as to make them read,—

"Oh, may my heart be tuned within,
Like David's sacred violin;"

and that, then, the new chorister to make the reading still more modern, changed the lines to read,—

“Oh, may my heart go diddle-diddle,
Like unto David’s sacred fiddle.”

Well, it is easier to sit back in the congregation and criticise the preacher, than it is take the pulpit and preach acceptably to the other critics.

The legal writer, who insists that a judge should apply the law according to its letter, without qualifying or modifying its application to a particular case, although harsh and impolitic under the special circumstances, will when he becomes judge of a court of record, often find it difficult to practice what he has been preaching.

If a bad law is to be strictly enforced, in order that it may speedily be repealed, according to President Grant’s theory, then it is not improbable that many persons will be subjected to rigorous penalties, who, morally speaking, are innocent of crime.

According to Blackstone, when he wrote his Commentaries, there were,—“Among the variety of actions which men are daily liable to commit, no less than one hundred and sixty, declared by Act of Parliament to be without benefit of clergy; or, in other words, to be worthy of instant death;”—many of which offenses are, in England, now punished, if at all, only by fine or imprisonment. Hundreds of prisoners were saved from capital punishment by the favorable rulings of the judges who, through compassion, found ways for the prisoners to escape the dreadful penalty. Of course, it often happened that a judge of stern and merciless temperament, without fear or favor, enforced the law strictly against the prisoner;—

“I am for law: he dies.”

The modern critic, with his pen, calls for the strict enforcement of the law without allowing any deviation from the strait and narrow way prescribed by the Legislature. He

cannot logically approve of the humanity of those English Judges who refused to inflict the death penalty against persons guilty of no serious crime. Had he been with Moses in the wilderness, he would have assisted in stoning to death the Israelite found gathering sticks on the Sabbath day. And when he becomes Judge, he will not be able to read between the lines of any criminal statute, the doctrine proclaimed by the Saviour of men, "Blessed are the merciful; for they shall obtain mercy."

I have not yet attempted to answer the question propounded by the law professor; and before doing so, let us imagine that the advocate of a strict enforcement of the law is a judge presiding at the trial of a few cases.

Suppose he were the presiding Judge at the trial of a score of college students indicted under the "Red Men's Act," (Sections 9, 10 and 11 of Chapter 148 of the West Virginia Code), for conspiring to punish another person or to take and carry away his property; and it were proved upon the trial that the boys had, pursuant to such conspiracy, tumbled a policeman in the mud and had taken and carried away his billy.

Would his Honor in this case, strictly enforce the law and send the boys to the penitentiary for not less than two nor more than ten years? Or, to avoid the necessity of the statutory punishment, would he, in the first instance, suggest to the prosecuting attorney, that the indictment be nollied, or that the boys be allowed to confess to assault and battery? Or would his rulings and instructions, during the trial, be so favorable to the defendants, that the jury catching the idea of the Judge, would find them not guilty? Or would he set aside the verdict,

Section 9 of Chapter 151 of the Code reads as follows:

"If any person playing at any game, or making a wager, or having a share in any stake or wager, or betting on the hands or sides of others playing at any game or making a wager, shall cheat or by fraudulent means win or acquire for himself or another, money or other valu-

able thing, he shall be confined in jail not more than one year, and fined not less than five times the value of the money or thing won or acquired."

Now, suppose our strict constructionist were presiding at the trial of a bevy of young ladies who had been indicted under this statute, for cheating and fraudulently winning the prize, at bridge, whist or other game of cards played at some party or reception. If his practice were in accord with his theory, and if a jury of twelve puritans—not a cavalier among them—found the prisoners guilty as charged in the indictment, the Judge would fine them five times the value of the prize, and send them to jail—perhaps for twelve months;— that the prisoners while in jail should do no further mischief; that while there they could amend their conduct; and that by the example of their punishment, others should take warning and refrain from violating the law—the three-fold object of punishment.

Chapter 92 of the Code provides, that if it be found by the jury that waste has been wantonly committed by any tenant of land, judgment shall be for three times the amount of damages assessed by the jury. Would our theoretical judge in this case, hew to the line, instruct the jury that they must assess the actual damages, if any, regardless of the statutory penalty? and after the verdict had been returned for such actual damages, say \$500.000, would he render judgment in favor of the plaintiff and against the defendant for \$1,500.00? Or, would his Honor, seeing the hardship of the case, play false to his own theory, and so rule upon the trial, that the jury knowing the law and his apparent feelings, would hold down the damages, so that judgment for three times the amount, would only be just and proper compensation for the plaintiff's injury?

Again, we will suppose the State were to institute proceedings at law to forfeit the charter of a corporation for its nonfeasance, or failure to comply with some statutory requirement—failure due to the carelessness or negligence of

some corporate official and not chargeable to innocent stockholders. Would our strict constructionist on the bench, who had on paper, advocated a strict enforcement of the law, be 'unmindful of the facts, that the corporation under fire, had been intrusted with the earnings of many individuals? That with their money, it had built up a valuable business and an active going concern; and that, if the charter were forfeited, it would mean financial loss and ruin to the stockholders? While he might believe that this soulless corporation, if it were possible, ought on general principles to be damned, nevertheless, he would, we think, righteously conclude that its sins of commission or omission, ought not to be unnecessarily visited on the stockholders.

And with this equitable idea in his mind, he would study the Act to see whether its language was mandatory or only directory; and he would carefully consider whether the non-feasance was prejudicial to the rights of the State. And, in our opinion, he would not render judgment of forfeiture, unless demanded by the law and the very right of the cause.

But what are the lawful limitations of the Judge's authority in such cases? I answer in the words of Blackstone, as found in the first book of his Commentaries, at section sixty-one:—

"But, lastly, the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and spirit of it; or the cause which moved the Legislature to enact it. For when this reason ceases, the law itself ought likewise to cease with it. * * * * * From this method of interpreting laws, by the reason of them, arises what we call **equity**, which is thus defined by Grotius:—'The correction of that wherein the law by reason of its universality is deficient.' For since in laws, all cases cannot be foreseen or expressed, it is necessary that when the general decrees of the law come to be applied to particular cases, there should be somewhere a power vested, of defining those circumstances, which, had they been foreseen, the Legislature himself would have expressed. And these are the cases which according to Grotius, **lex not exacte definit, sed arbitrio boni viri permittit.**"

Blackstone, in this connection, is not speaking of technical equity as administered by courts of chancery, but of what has been termed the "equity of the statute," as administered by courts of law.

Blackstone's exposition of the law, in this respect, has been assailed by numerous courts and text-writers. That judge, who is one of these critics, will, in the trial of cases, probably, but inconsistently with his own theory, do indirectly what Blackstone affirms is within his lawful authority.

He will qualify the literal meaning of a harsh and impolitic statute, or abate its rigor, by his rulings upon the trial; by directing a verdict; by requiring the plaintiff to reduce the damages assessed by the jury; by setting aside the verdict; or by other means known by the experienced judge.

As a practical rule to guide us in the administration of justice, I believe the text of the great commentator is right.

For example, in trying indictments charging the unlawful carrying of weapons, I would not, "for the first offense," fine a man fifty dollars and send him to jail for six months, because he had carried his razor to a barber shop to have it sharpened; nor for chasing with pistol in hand, a mad dog out of a yard and shooting him on another man's land or on the public road; nor for using a revolver, in arresting a burglar and marching him to the office of a justice of the peace; nor would I fine a man fifty dollars and send him to jail for six months (if *STATE vs. TAPIT*, 52 West Va. had been reversed and had not been affirmed), for carrying, at the request of the owner, and from his, the carrier's boarding-house to a repair-shop, a broken revolver that would not shoot; because, in my opinion, these cases would not come within the reason and spirit of the enactment.

In conclusion, I hope that my adversaries, in this opinion, will not conclude that,—

"Faith, I have been a truant to the law,
And never yet could frame my will to it;
And therefore frame the law unto my will."

EDWARD S. DOOLITTLE.

A PUZZLING QUESTION OF TAXATION IN THE CIRCUIT COURT OF OHIO COUNTY.

Appeal of C. H. Copp and
others from assessment
on old Post Office
property.

Opinion of Judge Nesbit setting aside assessment.

At public sale held on July 24, 1908, the old Post Office property was bid in by appellants at the price of \$118,500, the bidders electing to pay one-fourth in cash and the balance in three annual payments. This bid was accepted by the United States Government, and on August 13th, 1908, a formal contract for the sale of said property by the Government to the appellants was executed.

* * * * *

It is further provided that if the purchasers at any time make default for a period of thirty days in the payment of any of the installments or fail or neglect to fulfill any of their agreements the Government shall have the right to resell.

In the contract the Government agrees to convey the property to the purchasers after all payments have been made according to the terms of the contract, the deed to be by quit-claim.

Under this contract the appellants took possession, and are deriving revenue from the premises. None of the deferred installments of purchase money has been paid.

The question to be decided is this, may state, county, district and municipal taxes be lawfully assessed against this property in the names of the appellants?

In reaching a conclusion upon this question I have looked to the Federal decisions only for the reason that the question presented is purely a federal one,—a question involving the respective rights and powers of distinct sovereignties, rather than one arising under the interpretation of state laws. Of such questions the Supreme Court of the United States is the final arbiter.

Now in the early case of *McCulloch vs. Maryland*, 4 Wheaton, at page 429, Chief Justice Marshall says that "All subjects over which the sovereign power of a state extends,

are objects of taxation; but those over which it does not extend, are upon the soundest principle, exempt from taxation. This proposition may almost be pronounced self evident. The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single state. They are given by the people of the United States, to a government whose laws, made in pursuance of the Constitution are declared to be supreme. Consequently, the people of a single state cannot confer a sovereignty which will extend over them."

Further on in the same case the Chief Justice says (p. 430), "We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power. The attempt to use it on the means employed by the government of the Union, in pursuance of the Constitution, is itself an abuse, because it is the usurpation of a power which the people of a single state cannot give. We find then, on just theory, a total failure of this original right to tax the means employed by the government of the Union, for the execution of its powers."

This language is strong, "A total failure to tax the means employed by the government of the Union for the execution of its powers."

This principle is recognized and accepted as correct in the long line of cases dealing with the subject and following the case just cited, and may be regarded as settled law.

Now the establishment of post offices and post roads is a power conferred upon congress by the constitution. It is one of the means employed by the government of the Union. This power necessarily involves the right to own and control property for the purpose in view; for otherwise sovereignty in that respect would be incomplete and imperfect, and subject to superior sovereignty in the state where the property is located,—an impossible condition.

But, it is said, the government has sold this particular piece of property and it is no longer a part and parcel of the means employed by the government. On this subject the Supreme Court of the United States has ruled with great clearness. Notwithstanding the fact that the legal title to feder-

al property still remains in the government, such property may be taxed in the name of the purchaser and he will not be permitted to hide behind the government's legal title.

In *Wisconsin R. Co. vs. Price Co.*, 133 U. S. 496; 10 Sup. Ct. Rep. 341, Mr. Justice Field uses this language," * * * * "Where congress has prescribed the conditions upon which portion of the domain may be alienated, and provided that upon the performance of the conditions a patent of the United States shall issue to the donee or purchaser, and all such conditions are complied with, the land alienated being distinctly defined, it only remaining for the government to issue its patent, and until such issue holding the legal title in trust for him, who in the meantime is not excluded from the use of the property, * * * then the donee or purchaser will be treated as the beneficial owner of the land, and the same be held subject to taxation as his property. This exception to the general doctrine is founded upon the principle that he who has the right to property, shall not be permitted to use the legal title of the government to avoid his just share of state taxation." This proposition seems to be well settled. See *Carroll vs. Safford*, 3 How. 441; *W. P. Ry. Co. vs. Patterson*, 154 U. S. 130; 14 Sup. Ct. Rep. 977; *Hussman vs. Durham*, 165 U. S. 144; 17 Sup. Ct. Rep. 253; *Maish vs. Arizona*, 164 U. S. 609; 17 Sup. Ct. Rep. 193.

But it seems to be equally well settled that this doctrine applies only to cases where the equitable title of the purchaser has become complete, to the exclusion of all equity in the government, without anything more to be paid or any act done going to the foundation of the purchasers right to his deed.

In the very case of *Wis. Cent. Ry. Co. vs. Price County*, above quoted, Justice Field limits the operation of the rule, or rather the exception, there laid down, to cases where the alienee is possessed of the full equitable title and of a perfected right to the legal title, in other words, where "all such conditions are complied with, * * * it only remaining for the government to issue its patent, and until such issue holding the legal title in trust for him, who in the meantime is not excluded from the use of the property,—in other words when the government has ceased to hold any such right or interest in the property as to justify it in withholding a patent from the donee or purchaser, and it does not exclude him from the use of the property."

In *Hussman vs. Durham*, above cited, Mr. Justice Brew-

er says, "while it is undoubtedly true that when the full equitable title has passed from the government, even prior to the issue of a patent conveying the legal title, the land is subject to state taxation, yet until such equitable title has passed, and while the land is still subject to the control of the government, it is beyond the reach of the state's power to tax."

In the case of *Maish vs. Arizona*, also above cited, it is a distinct ground of the holding of the court to the effect that the objection to the taxing of the lands is not sustained, that there was no showing made that the Mexican grant of the lands was not a "perfect grant," giving the patentee full equitable title.

In *Carroll vs. Safford*, also above cited, in which lands sold by the government but for which patents had not yet issued, were held properly taxable, it is distinctly stated, and is one of the grounds of the decision, that the lands had been fully paid for. Justice M'Lean says, "When the land was purchased and paid for, it was no longer the property of the United States, but of the purchaser." Again, he says, "Suppose the officers of the government had sold a tract of land, received the purchase money, and issued a patent certificate, can it be contended that they could sell it again, and convey a good title? They could no more do this than they could sell land a second time which had been previously patented."

In *Railway Co. vs. Prescott*, 16 Wal. 603, the Supreme Court of the United States distinctly decided that:

"Although lands sold by the United States may be taxed before the government has parted with the legal title by issuing a patent, this principle is to be understood as applicable only to cases where the right to the patent is complete, and the equitable title fully vested without anything more to be paid or any act done going to the foundation of the right."

In *Railway Co. vs. McShane*, 22 Wal. 444, the holding just quoted is unqualifiedly re-affirmed. In that case the court on page 462 expressly holds that the payment of mere costs of surveying was a condition precedent to the right to receive a patent, and that until such payment was made the equitable title of the alienee is incomplete, and that, therefore the lands were not taxable in the name of the alienee.

The doctrine of the *Prescott* and *McShane* cases was re-

affirmed in the later case of *Colorado Co. vs. Commissioners*, 95 U. S. 259.

The Tax Commissioner quotes in support of his contention that the property in question may lawfully be taxed the following from *Gray on Limitation of the Taxing Power*:

"In the case of public lands the rule does not except land which has been sold but not patented, that is, lands as to which the equitable title has passed out of the federal government while it still has the naked legal right. Such lands are taxable by the states."

I have not had access to the volume quoted, but it is clear from the federal cases above cited and quoted that this paragraph is to be read in the light of the repeated holding of the Supreme Court of the United States, that in order to render such lands taxable it is necessary that the full equitable title has passed, and that nothing remains to be done by the purchaser to entitle him to a deed or patent giving him the legal title.

That is not the case here. Equity of the most substantial kind is retained by the government. Only one-fourth of the purchase money has been paid. The government holds a lien to the extent of three-fourths of the purchase price. It retains the right to oust the possession of the purchasers upon default in complying with any one of several conditions. It retains a right of superintendency of repairs and alterations. It retains the right to re-sell upon default. This is more than mere naked legal title. It is a substantial equitable interest, superior to the equity of the purchasers in case default is made.

Counsel for the State suggest that what would happen in case this property were sold by the State for the non-payment of taxes is not important, and should not affect its taxability. He says that this land would be treated in just the same way as any other land returned delinquent and sold, and that in selling the property the state would only convey such title as the appellants had to it when it was returned delinquent. He says that the interest of the federal government would remain unimpaired. In support of this contention *Smith vs. Lewis*, 2 W. Va. 39, is cited. All that need be said in this connection is that the law of *Smith vs. Lewis* is no longer the law of West Virginia. The legislature changed the law in that regard when it enacted section 25 of chapter 31 of the Code. In that section we find this language:

"If at the time of such sale the real estate sold be under a mortgage or deed of trust, or there be any other lien or encumbrance thereon, and the mortgagee, trustee, cestuique trust, or person holding any such lien or encumbrance, shall fail to redeem the same within the time prescribed by the fifteenth section of this chapter, then all the right, title and interest of such mortgagee, trustee, cestuique trust, and of the person or persons holding any such lien on the real estate so sold and not redeemed, shall pass to and be vested in the grantee in such deed; and his title to the premises shall in no way be affected or impaired by any such mortgage, deed of trust, lien or encumbrance."

Thus under the express provision of a statute of our state, a sale of this property, for delinquent taxes would divest the United States government of all its interest. Here we have a direct conflict between the state government and the federal government. Under the cases above cited this conflict must be resolved against the right of the state to tax the property in question.

It cannot be said that only the interest of the appellants is taxed and that the interest of the government is left free. In the first place, the assessment is made at the full value of the whole property. In the second place there is no provision of West Virginia law, of which I am aware, which would authorize the separate assessment of one equitable interest in an entire property. Our law says that the assessment shall be made in the name of the person in possession of the immediate freehold, and that unless he, or some other person interested in the property pay the taxes so assessed, the whole property shall be sold including the interest of everybody concerned, whether as owner, trustee, mortgagee, cestuique trust, lien holder or otherwise; and that the purchaser shall take the property free of the claims of all such persons.

The case of *Baltimore etc. Dry Dock Co. vs. Baltimore*, 25 Sup. Ct. Rep. 50, cited by counsel for the state, I regard as not in point here for two reasons distinctly pointed out in that case by Mr. Justice Holmes. First, the assessment in that case was not made against the whole property, but only against the interest of the dock company; second, in that case the interest of the United States in the land in question was a mere condition subsequent which might never take hold, and not a present interest in the rem. In this case

the interest is a present subsisting lien and power of control to secure the payment of the balance of purchase money, and besides the legal title is retained.

I am of opinion that the assessment in question is invalid, and should therefore be set aside.

A kind old gentleman, seeing a very small boy carrying a lot of newspapers under his arm, was moved to pity.

"Don't all those papers make you tired, my boy?"

"Nope," the mite cheerfully replied. "I can't read."—Youth's Companion.

A physician, upon opening the door of his consulting room, asked: "Who has been waiting longest?"

"I have," spoke up the tailor; "I delivered your clothes three weeks ago."—The Argonaut.

Some years ago, a man in Nantucket was tried for a petty offense, and sentenced to four months in jail. A few days after the trial the judge who had imposed sentence, in company with the sheriff, was on his way to the Boston boat, when they passed a man busily engaged in sawing wood.

The man stopped his work, touched his hat politely, and said: "Good morning, your honor."

The judge, after a careful survey of the man's face, asked: "Isn't that the man I sentenced to jail a few days ago?"

"Yes," replied the sheriff, with some hesitation, "that's the man. The fact is, Judge, we—er—we don't happen to have anybody else in jail just now, so we thought it would be a sort of useless expense to hire some one to keep jail four months just for this one man. So I gave him the jail key and told him it would be all right if he'd sleep there o' nights."—Harper's Weekly.

West Virginia Court of Appeals

Decisions Handed Down at the Last Term

Reported Especially for the Bar

Appearing Here for the First Time in Print

RITCHIE LUMBER CO. v. NUTTER.

Wood County. Reversed and Remanded.
Williams, Judge.

SYLLABUS.

1. It is essential to the validity of a tax deed that the delinquent list should have been returned to the office of the clerk of the county court, before a sale of the land, and by him recorded in a permanent book to be kept in his office for that purpose, and thereby made a part of the proceedings of record in his office affecting the tax title.

2. Depositing in the county court clerk's office a book containing the list of real estate returned delinquent for the non-payment of city taxes, entered therein by the city auditor, and in no way attested by the county clerk, does not make such delinquent list a part of the records of said clerk's office.

3. In order to constitute a record it must be the act of an officer duly authorized and empowered to act in the premises.

4. The failure of a city tax collector to make return to the city council, within the time prescribed by the city charter, of a list of the real estate delinquent for the non-payment of city tax, will not render invalid a tax deed; such failure to make return within the time specified is only an "irregularity" in making the return which is cured by Sec. 25, Ch. 31, Code.

BEECHER v. FOSTER ET ALS.

Ritchie County. Affirmed.
Williams. Judge.

SYLLABUS.

1. The decree of the Supreme Court of Appeals upon a question decided by the lower court and presented for review on appeal, is final and irreversible; and upon a second appeal in the cause the questions decided in the former appeal can not be reviewed.

2. When a cause is remandedd by the Supreme Court of Appeals to the lower court for further proceedings to be had therein according to the opinion of the appellate court, and a doubt arises as to the meaning and effect of the mandate and opinion, it may be ascertained by reference to the bill and other proceedings in the cause.

Miller, P., absent.

BRALLEY, ADM'R. v. NORFOLK & WESTERN RY. CO.

McDowell County. Reversed and Remanded.
Poffenbarger, Judge.

SYLLABUS.

1. In actions for negligence, a declaration, charging the defendant with a specific act, injurious to the plaintiff, and averring generally negligence in the performance of the act, is sufficient. It need not set out in detail all the specific acts, constituting the negligence complained of.

2. In such connection, the general averment of negligence is one of fact, and not a conclusion of law.

3. A mere licensee of a railway company, not in the employ, using the track for his own purposes, as for a foot or walk-way, assumes, in the exercise of his privilege, all the risks incident to such use of the track, and the railway company owes him no greater duty of protection than if he were a trespasser.

4. In the trial of an action against a railway company for the negligent killing of an intoxicated person on its track, it is error to instruct the jury that the company is liable for injuries to such person "when, after the negligence in going upon the track, the engineer of the train, by the exercise of ordinary care, could have

avoided the injuries to him," in this, that it ignores the important element of knowledge on the part of the engineer or any servant of the company in charge of the train, of the drunkenness of the trespasser.

UNION STOPPER CO. v. WOOD.

Monongalia County. Reversed, Demurrers Overruled, and Remanded.

Robinson, Judge.

SYLLABUS.

A count in assumpsit, upon a special contract, which contains averments of all matters that are essential to fix upon defendant the real liability arising from his breach thereof is sufficient upon demurrer, notwithstanding the count contains matters based upon an erroneous interpretation of defendant's liability under the contract which must be excluded as immaterial to a true stating of the case and as mere surplusage.

THE CITIZENS BANK OF WESTON, ET ALS., v. S. L. WILFONG, ET ALS.

Braxton County. Reversed and Remanded.

Poffenbarger, Judge.

SYLLABUS.

1. A volunteer, claiming under a party to an actually fraudulent conveyance, is not protected.
2. If a husband purchase land, with intent to defraud creditors of the vendor, and cause it to be conveyed to his wife, she paying nothing for it, the creditors of the grantor may set aside the deed and charge the land to the extent of their debts.
3. In such case, the conveyance could be successfully assailed, as being conclusively fraudulent, by the creditors of the husband, existing at the time of the purchase.

4. In the law of fraudulent conveyances, mere badges of fraud, such as fraudulent acts in respect to property other than that involved in the suit and subsequent in time to the conveyance, assailed, relationship of the parties, their prior and subsequent association in business, incurrence of large subsequent indebtedness, are, in themselves, only circumstances, raising slight interferences of actual fraud, and insufficient to overthrow a deed, when negatived by well established facts and circumstances clearly inconsistent therewith.

KIRK v. THE CAMDEN INTER-STATE RAILWAY COMPANY.

Cabell County. Dismissed.
Brannon, Judge.

SYLLABUS.

A case dismissed for want of finality of judgment.

FINK v. THOMAS.

Mercer County. Judgment Reversed.
Brannon, Judge.

SYLLABUS.

1. An order in vacation showing the execution of a bill of exceptions, not signed by the judge, is certified as a part of the record. A paper is presented, certified by the clerk, showing the same order, having endorsed upon it, "Enter. I C. Berandon," who is judge. The bill is good as part of the record.

2. An instruction binding the jury to give exemplary damages is erroneous.

3. Exemplary or punitive damages in an action for tort are not matter of right, and it is with a jury to say whether or not they shall be given.

4. In an action for assault and battery punitive damages can not be found unless the act is unjustifiable, wilful, wanton and reckless, manifesting malice.

McMILLAN v. NEELEY, MAYOR.

Marion County. Alternative Mandamus Dismissed.
Brannon, Judge.

SYLLABUS.

1. The provision of the charter act of the City of Fairmont passed in 1899, demanding freehold qualification for a councilman is constitutional.

2. That provision of the charter act of the City of Fairmont passed in 1899, that "the majority of the whole number of officers mentioned in the 3d. section of the act shall be necessary to the transaction of any business whatever," is intended only to demand such majority for a quorum, for business, and does not require a majority of the whole number for ordinary business, if such quorum be present.

REYNOLDS v. WHITESCARVER, ET ALS.

Taylor County. Reversed and Remanded.
Williams, Judge.

SYLLABUS.

1. A widow is dowable in all the real estate of which the husband, at any time during the coverture, was seized of an estate of inheritance, without regard to whether or not she can make beneficial use of her dower estate.

2. If a wife sign and acknowledge a trust deed executed by her husband, conveying his land to secure some of his creditors to the prejudice of others, which trust deed is void as to such preference by reason of the statute and the husband's insolvency, she is not thereby estopped from claiming dower in the surplus proceeds of sale of the lands and unopened coal veins underlying the same, over the amount necessary to pay the debts expressly secured by the trust deed. Sec. 2, ch. 74, Code, does not enlarge the scope of such trust deed beyond its expressed purpose to the detriment of the wife's right to dower.

Robinson, J., absent.

RIGGS v. CARROLL, ET ALS.

**In Prohibition. Demurrer Sustained, Rule Discharged, and
Writ Refused.**

Miller, President.

SYLLABUS.

1. Section 4, chapter 147, Acts of the Legislature 1901, said chapter being the charter of the City of St. Marys, providing that "The municipal authorities of said city shall consist of a mayor, recorder, and six councilmen, two of which councilmen shall be elected in and for each of the wards of said city, who together shall form the common council, &c.", properly construed with reference to the general law and its other pertinent provisions, gives right to the recorder to vote, including the rights to vote when the council is sitting, pursuant to section 13 of said act, to decide an election contest.

STANTON v. THE VITY OF PARKERSBURG.

**Wood County. Reversed and Remanded.
Williams, Judge.**

SYLLABUS.

1. Sec. 53, Ch. 43, Code, imposes an absolute liability on incorporated cities and towns for injuries sustained on account of its public streets and sidewalks being out of repair, or obstructed in such a manner as to make it dangerous to travel thereon in the ordinary modes.

2. In case of necessity such city or town may permit a temporary obstruction of any of its public streets or sidewalks, but it is bound to take proper precaution to warn the public of the danger occasioned by the obstruction.

3. In an action for negligently causing a personal injury, the jury are to judge from the nature and extent of the injury, the pain and mental anguish produced by it, what is a reasonable compensation.

4. When an instruction, embodying an hypothesis, dependant

upon the finding of a certain fact by the jury, has been given for one party, it is error to refuse an instruction for the opposite party, stating the converse of the legal proposition embraced in the one given, there being evidence tending to sustain both theories of the case.

UNION STOPPER CO. v. MCGARA.

Monongalia County. Reversed, Demurrers Overruled, and Remanded.
Robinson, Judge.

SYLLABUS.

1. Where one agrees, by way of subscription to the promotion of a glass factory, to convey real estate of a stated value to parties who, relying upon such agreement, keep and perform on their part the things undertaken to be done as a consideration for the subscription, the contract is binding and damages may be recovered for its breach in failing to convey.

2. A contract of subscription to an enterprise providing on the part of the subscriber only for the conveyance of real estate of a stated value is not, in any event, a contract for the payment of money. Redress for failure of the subscriber to observe his contract is by suit for damages, not for a debt.

3. Counts in assumpsit which aver defendant's undertaking and a legal consideration therefor, the breach of defendant in failing to keep that undertaking, and the injury to plaintiff therefrom, are generally sufficient.

4. Counts of a declaration which omit in their averments nothing so essential to the action that judgment according to law and the very right of the cause cannot be given, are sufficient.

5. If a count alleges sufficient matter of fact to warrant a recovery, all immaterial allegations may be disregarded. Surplusage never vitiates a declaration.

6. Generally, a count in assumpsit which shows that what is equivalent to a promise has taken place is good without the use of the word "promise."

7. Where notice to a defendant of any fact is not necessary to fix the alleged liability on him, it need not be averred in stating the case.

STATE v. MILLER.**Mineral County. Affirmed.****Poffenbarger, Judge.****SYLLABUS.**

1. The federal statute, passed on the 8th day of August, 1890, known as the "Wilson Act", removed all limitations upon the powers of the states to regulate or prohibit, all sales, contracts and other acts and transactions, relating to intoxicating liquors, occurring wholly within their territorial jurisdictions.

2. The provisions of Chapter 32 of the Code, respecting sales and other transactions, in the state, pertaining to intoxicating liquors, as amended and re-enacted, since the date of the passage of said "Wilson Act", apply to retail dealings of that kind, wholly within the state, on the part of non-residents as well as residents.

3. Said provisions prohibit a non-resident dealer, having no license under the laws of this state to sell at retail, and solicit and receive orders for, such liquors, from soliciting or receiving orders for the same, to be sold at, and shipped into this state from, a place in another state.

GEORGE, ADM'R. v. CRIM, ET ALS.**Barbour County. Affirmed in Part; Reversed and Remanded.****Poffenbarger, Judge.****SYLLABUS.**

1. A surety, on the payment by him of a judgment constituting a lien on the property of his principal, is entitled in equity, without an assignment thereof, to be subrogated to all the rights, powers and remedies of the judgment creditor, for the enforcement of the lien against property of the principal debtor for his own benefit.

2. Though, in law, a judgment lien, or other incumbrance on property, is merged in the legal title to the property by the purchase of the same by the creditor and ceases to exist, it is otherwise in equity, if the interest and just rights of the parties require the lien to be kept alive; and, in such cases, equity will regard it as still subsisting and enforce it by means of subrogation or otherwise for the protection of the purchaser.

3. Purchase by a judgment creditor of property on which the judgment is a lien does not release a surety in the judgment, if the property so purchased was encumbered by prior liens in favor of the purchaser to the extent of the full value thereof.

4. A judgment creditor, having a number of judgments against the debtor, in some of which there are sureties, may pursue his remedies by execution and otherwise for the collection of the judgments in which there are no sureties, without violation of any duty to the latter, provided he has not been in any way required by them to proceed to collect the judgments for which they are liable, and, if property be taken on execution on such other judgments and released, or the executions be returned unsatisfied, the issuance, levying and return of the same, neither release the sureties in such other judgments, nor work a discharge or satisfaction of the judgments on which they were issued, so as to give priority to such others in favor of the sureties.

5. A surety's right of subrogation is an equity, not always disclosed by the judgment, and persons having on knowledge thereof may deal with the property on which the judgment is a lien as if such right did not exist.

6. A purchaser of property, with notice of a right in a surety to charge the same, by way of subrogation, takes it subject to such equitable right.

7. In a suit by a surety, to enforce the lien of a judgment against land of the principal debtor, conveyed to the judgment creditor, and contribution from his co-sureties, after the death of the principal debtor and the judgment creditor, such co-sureties are not competent witnesses to prove the relation of suretyship.

8. In the absence of an exception for generality, a general, informal and indefinite denial of a material allegation in an answer is sufficient.

STONE v. CAMPBELLS CREEK RAILROAD COMPANY.

Kanawha County. Judgment Reversed.
Brannon, Judge.

SYLLABUS.

1. Where a declaration for personal injury from negligence details the facts or circumstances of negligence, so the main or essential facts pleaded as constituting the negligence be proven, the failure to prove details or incidental facts in the transaction,

not vital to the action, does not constitute variance or defeat recovery.

2. The statement made by an engineer of a locomotive, "I told him to get off the engine, and he dropped down in front of the engine," made three or four minutes after injury to a boy jumping from a train, and run over by it, is admissible under the rule of *res gestae* in an action by a boy against a railroad company to recover for the injury.

HAWKINS, ADMINISTRATOR, v. NUTTALLBURG COAL & COKE CO.

Fayette County. Reversed.
Brannon, Judge.

SYLLABUS.

In an action under chapter 103, section 5, Code, to recover damages for the death of a person from wrongful act or neglect, and a verdict for the plaintiff is, on his motion, against the objection of the defendant, erroneously set aside because of smallness of the amount of the verdict, the defendant may have a writ of error.

DEMOSS v. MCGEE, ET AL.

Preston County. Affirmed.
Miller, President.

SYLLABUS.

1. In a suit by a creditor, under section 1, chapter 74, of the Code, to set aside a deed of trust, or an absolute conveyance, as having been made by his debtor to delay, hinder and defraud him in the collection of his debt, all fraud and fraudulent intent being denied and the proof showing the conveyance to have been made for full and adequate consideration, to secure and pay a bona fide debt to another creditor mere badges of fraud, as that the consideration recited was cash, and that it was slightly in excess of the amount of the debt secured or paid, and that such excess was paid the grantor, and the like, will not be sufficient to impeach such conveyance as fraudulent in fact.

2. A bill by a creditor under section 1, chapter 74, of the Code, to impeach for actual fraud the deed of his insolvent debtor, but failing in that object, will not be treated as a bill under section 2, of said chapter, to avoid such deed as a preference, and to have it declared a general assignment for the benefit of all creditors as provided thereby.

STATE v. McNEAL.

Randolph County. Judgment Reversed.
Brannon, Judge.

SYLLABUS.

It is not an offence in a licensed saloon keeper to deliver to a minor intoxicating liquor under an order from the minor's father to the saloonist under a prior agreement between the father and the saloonist that whenever the father should send the son with a written order, the saloonist should let the son have whatever liquor it called for for the father's use.

BENNETT v. HOLLINGER.

Hancock County. Judgment Reversed. Verdict Set Aside.
New Trial Awarded.
Miller, President.

SYLLABUS.

1. The rules respecting description of the property required in unlawful detainer, and amendments of the summons or complaint therein, announced in *Simpkins v. White*, 43 W. Va. 125; *Thorn v. Thorn*, 47, W. Va. 4; *Drinkard v. Heptinstall*, 55 W. Va. 320, and *Billingsley v. Strutler*, 52 W. Va. 92, approved and applied.

2. In unlawful detainer, where a tenancy is by the month, a definite period, as distinguished from a tenancy for an indefinite period, as from month to month, no notice to quit is necessary; but a demand for possession and refusal to renew such monthly tenancy, and if the ground of the action be for breach of contract to pay rent, demand for the rent at the time and place stipulated, are conditions precedent to such right of action.

3. In an action of unlawful detainer by landlord against tenant, damages for breach of contract to pay rent reserved are not recoverable, where it is shown that defendant, with the consent, or by agreement with the plaintiff, attorney for the rent to a third person.

STATE v. GRAVELY.

Raleigh County. Reversed. New Trial Awarded.
Miller, President.

SYLLABUS.

1. A charge interpolated in an indictment for murder after the main charge in the form of the statute, and preceeding the conclusion, "against the peace and dignity of the state," that defendant had been before sentenced in the United States, to a period of confinement in the penitentiary for the murder of one Laws, in Surry County, North Carolina, does not constitute a separate and district court, nor render the indictment had for want of a proper conclusion.

2. An instruction that where a homicide is proved, the presumption is that it is murder in the second degree, and that the burden is on the state to raise it to first degree murder, and on the accused to show want of malice and other facts and circumstances reducing the offence to manslaughter, or to any lesser offense provable under the indictment, is not bad, or inapplicable, though the evidence be not sufficient to support a verdict higher than voluntary manslaughter; the presumption referred to being a presumption of law arising from the construction given section 4200, Code 1906, and not a presumption of fact, depending on the facts and circumstances attending the homicide, and shown in evidence. Poffenberger, Judge, dissenting in part.

3. On a trial for murder where self defense is relied on, an instruction telling the jury, among other things, that "it can not be inferred from the bare act of striking, without any dangerous weapon, that the aggressor intended to kill, and that unless there be a plain manifestation of a felonious intent, no assault, however violent, without a deadly weapon, will justify killing the assailant under the plea of necessity," and by which the remainder of the instruction attempting to apply this law to the facts proven

is limited, is erroneous as calculated to mislead and deceive the jury. It is not the law that "no assault, however violent, without a deadly weapon, will justify the killing of an assailant."

DUDLEY v. BARRETT ET ALS.

Wood County. Affirmed.
Poffenbarger, Judge.

SYLLABUS,

1. For the enforcement of payment of a part of a debt, assigned by the creditor without the assent or acceptance of the debtor, there is no jurisdiction in a court of law, but such partial recovery may be had in a court of equity.

2. A plaintiff in a suit in equity, for whose benefit an action at law is pending for the recovery of the demand set up in his bill, cannot be compelled to elect as to which suit he will prosecute, if there appears to be jurisdiction of such demand in the equity court and none in the law court.

3. Before an election of remedy can be ordered, it must appear that the party has more than one remedy.

4. A paper, assigning a demand, in general terms, to a named person and others therein to be named, and declaring the purpose of the assignment to be payment of a certain debt, described, to each of the persons named, and the residue, if any, to be intended for the assignor, is construed and held to be an assignment of certain parts of the debt to each of the persons named.

5. An appellate court will not reverse a decree, properly made on a commissioner's report for the sole reason that the cause, in the condition in which it was, when the order of reference was made, ought not to have been referred to him.

6. Words in a pleading are to be taken in the sense in which the context shows they were used.

7. After the lapse of a reasonable time, from the date on which a deputy sheriff should have collected, and accounted to his principal for, taxes charged to him for collection, he will be presumed, in the absence of evidence to the contrary, to have collected them.

8. In an action on a bond of a deputy sheriff for the recovery of money due from him on account of taxes collected by him or which he should have collected, a variance of proof from the plead-

ings is not established by the fact that the bill claims a balance due on account of the last two years of the four year period, while the proof shows that collections of said years were applied on the accounts of the preceding years so as to produce such balance.

9. The taking of a new simple contract obligation for a specialty debt does not pay the original debt, nor suspend the right of action on the original contract.

10. Upon a bill in equity, stating a cause of action, constituting a common basis for claims due the plaintiff and certain defendants against other defendants, and praying relief to the plaintiff and the defendants, having demands based on such common ground, which is taken for confessed as to a defendant of the class, last named, a decree may properly be rendered in his favor, although the record shows no express prayer by him for relief.

11. It is not error to pronounce a decree in favor of a *pendente lite* purchaser who has not been made a party to the suit.

STATE v. WM. T. EMBLEN.

Ohio County. Reversed and Remanded.

Poffenbarger, Judge.

SYLLABUS.

1. Upon the trial of an indictment for leasing and letting a house to be used as a house of ill-fame, a written instrument, signed and acknowledged by the parties, purporting to be a contract for the sale of the property, relied upon as a defense, may be shown by the state to be a collusive, fraudulent paper executed for the purpose of evading the statute, and, although, on its face, a contract of sale, to be only a colorable and sham sale, not precluding the existence of the relation of a landlord and tenant between the parties.

2. To avoid the effect of such a paper, the state need not establish, by direct evidence, a separate verbal or written contract or lease. It may be inferred from facts and circumstances, showing the fraudulent intent and purpose of the parties in the execution of the pretended contract of sale.

3. An endorsement upon a copy of the record of a criminal action, purporting to be a return of service thereof upon an individual by an officer, authorized by law to execute process and serve

legal notices, is not evidence of the delivery of such copy to the person named in such endorsement.

4. An officer's return is not evidence of the performance by him of acts not within his official duty and powers.

NIXON v. KIDDY.

Randolph County. Affirmed.
Robinson, Judge.

1. Payment by a debtor and receipt by the creditor of a less sum than is due upon an undisputed liquidated demand is not satisfaction of the debt, although the creditor agrees to accept it as such, if there be no release under seal or no new consideration, given as to the part left unpaid.

2. If a debtor gives to his creditor a check for part of an undisputed liquidated sum due, reciting in the check that it is in full of the debt, the acceptance and use of the check by the creditor does not discharge the entire debt in the absence of a consideration for the release of the unpaid part.

SULLIVAN v. SAUNDERS ET ALS.

Cabell County. Reversed and Remanded.
Williams, Judge.

SYLLABUS.

1. A note taken by a judgment creditor in consideration of his judgment, although made by a person not bound by the judgment, will not extinguish the judgment without an agreement by the creditor that the note is to operate as a payment.

2. When a trust deed creditor buys the trust subject and takes a conveyance therefor from his debtor, his lien is not thereby so merged in his estate as to make his entire estate in the land subject to an intervening lien; equity will preserve the trust lien for his protection, notwithstanding he may have executed a formal release of it.

3. Such trust deed lien will be kept alive by a court of equity in favor of a grantee of such purchaser also, where no injustice will be done thereby.

RUCKER v. CITY OF HUNTINGTON.

Cabell County. Reversed and Remanded.
Poffenbarger, Judge.

SYLLABUS.

1. An injury to the driver of a reasonably safe and gentle horse on a public highway, caused by contact of the vehicle in which he is riding with an obstruction on the street or road, on a sudden dodging, swerving or shying of the horse, in temporary fright, is actionable.

2. Such conduct on the part of a horse is usual and ordinary and raises no presumption of negligence on the part of the driver.

3. As there is, in such case, no assumption of risk on the part of the driver, since the act of driving over or against the obstruction is involuntary, and he is not in any sense negligent or at fault, the obstruction is legally the sole and proximate cause of the injury.

STATE v. GARNETT.

From Nicholas County. Affirmed.
Brannon, Judge.

1. When title to land vested in the State by forfeiture for taxes has been transferred to a person by Section 3, Article 13, of the Constitution, the state cannot sell the land as forfeited for any forfeiture then existing. All title then in the state by reason of purchase or non-entry for taxes passes by such transfer to such person.

2. After title to land vested in the state by forfeiture for taxes has been once transferred to a person by force of Section 3, Article 13, of the Constitution, the former owner of the forfeited title cannot redeem the land.

3. When sale has been made of land as forfeited for taxes in a proceeding for its sale as such, it cannot be again sold for any forfeiture existing at the date of such sale under the same or other title.

4. When the state owning land under a sale for taxes afterwards sells it to an individual for non-payment of taxes, subsequently assessed, the state will be estopped from selling the land under its title acquired by such former tax purchase. The title of the state so acquired passes to such individual tax purchaser.

5. Deeds for land sold as forfeited under Chapter 105 of the Code, made before the passage of Chapter 42, Acts of 1909, are cured of any irregularity, error or informality by that act.

6. Payment of the taxes by one holding legal title to a tract of land, part of which is held by him in trust for another, saves that part from forfeiture for non-entry in the name of the equitable owner of such part.

7. Payment of Taxes by Stranger.

DEEPWATER RAILWAY COMPANY v. HONAKER, COM-
MITTEE, ET ALS.

Mercer County. Reversed, and Judgment for Plaintiffs
in Error.
Miller, President.

SYLLABUS.

1. A conveyance of land to trustees for the use and benefit of a religious sect or denomination, as a place of public worship, is, by section 2606, Code 1906, valid, and not void for uncertainty, and, as provided by said statute, will be construed to give the local society or congregation of such religious sect or denomination control thereof.

2. A deed of a married woman made to trustees in 1881, for the use and benefit of a religious sect or denomination, invalid for want of privity examination, as the law then was, is not by statute good as a parol dedication of the property attempted to be conveyed, the statute not sanctioning or authorizing such gifts otherwise than by deeds of conveyance.

3. The proviso of section 2606, Code 1906, "That no lot of ground used for church purposes shall be taken from the mem-

bers of the church that purchased the same, or for whose use or benefit it was conveyed, devised or dedicated," has application alone to the clause immediately preceding, and was not intended to validate void deeds of conveyance, devises or dedications of land not authorized by said section, nor does the latter clause of section 6, chapter 57, of the Code, (section 2612, Code 1906) have that effect.

Quaere: Although parol dedication of land to a religious sect or denomination be not authorized by statute in this state, could such a gift be supported as a common law dedication thereof, for the uses and benefit of such religious sect or denomination? Discussed but not decided.

4. Where a case has been referred to a commissioner, and the commissioner's report and findings of fact have been overruled by the court below, this court will determine for itself, from the evidence, whether it will sustain the conclusion of the commissioner or those of the court.

5. Church trustees, like other persons, may under a deed as color of title acquire good title to land by adverse possession, though the deed be the deed of a married woman, purporting to convey her separate estate, but void for want of privy examination, and they will acquire such title as the deed purports to convey.

6. If such deed purports to convey land absolutely, though upon trust, but not upon condition precedent or subsequent upon which the vesting of the title is to depend, such deed will not be construed to create an estate on condition, unless language is used which *ex proprio vigore* imports a condition. If such deed contain limitations on the power of alienation, repugnant to the estate created they will be void as against public policy.

HAIRSTON v. UNITED STATES COAL & COKE COMPANY.

McDowell County. Judgment Reversed.
Brannon, Judge.

1. In an action for injury to a servant from defective appliances evidence of the making of repairs or alterations immediately after the occurrence of the injury is not admissible.

2. An infant over the age of fourteen years is presumed to

have sufficient discretion and understanding to be sensible of danger and to have power to avoid it.

3. As a general rule, after a boy has reached fourteen years of age, courts do not permit juries to presume him incompetent for the duties of a particular employment because of minority alone, and the burden of proof is upon the party alleging incompetency to show it.

MUNN v. WELLSBURG BANKING & TRUST CO.

Brooke County. Reversed.
Miller, President.

SYLLABUS.

1. One employed by a corporation to serve as bookkeeper, for a definite period, is not *ex vi termini* an officer or agent of such corporation within the intentment of section 2281, Code 1906, holding his place during the pleasure of the board of directors, and removable without cause by such board without liability upon the corporation for a breach of its contract of employment.

PREWETT v. THE CITIZENS NATIONAL BANK OF PARKERSBURG.

Wood County. Affirmed and Remanded.
Poffenbarger, Judge.

SYLLABUS.

1. Fraud in the procurement of an accommodation endorsement of a negotiable promissory note, alleged to have been perpetrated by the holder thereof, may be proved as matter of defense in an action at law, instituted by him on the note.

2. In respect to redress of an injury, predicated on such a fraud, courts of law and courts of equity have concurrent jurisdiction.

3. In cases of concurrent jurisdiction, the maxim, *Qui prior est tempore, portior est jure*, applies, and that court whose jurisdiction first attaches will retain cognizance of the cause, unless it be the law court and ground for removal into a court of equity is set up and sustained.

4. Though necessity for discovery constitutes good ground for removing a cause from a legal to an equity forum, the bill must show the evidence required cannot be obtained, under the common law rules, otherwise than by discovery in equity, and is indispensable to the protection or relief of the plaintiff.

5. Matter, constituting only ground for inference of motive

for making alleged false representations, relied upon for relief, though relevant and material, is not deemed indispensable evidence, within the rule, prescribing the requisites of a bill for discovery and relief, because remote and indirect in its bearing upon the cause of action or matter of defense.

6. Allegations of a bill, seeking relief in equity, which really amount to nothing more than pretexts for the exercise of jurisdiction, are disregarded.

MILLER v. STERRINGER.

Tucker County. Affirmed.

Robinson, Judge.

SYLLABUS.

1. The county court, upon notice to the party proceeded against, has power to find that one is non compos mentis and to appoint a committee for him.

2. Upon demurrer directed to particular allegations, the general purpose of the whole bill will be considered, so as to test their proper relation to some general equity to which plaintiff shows himself entitled.

3. Equity will relieve one from a contract made by him in drunkenness, though his reason may not have been wholly overthrown, where fraudulent advantage has been taken, or where the drunkenness has been brought about by the other party.

GRANT v. BALTIMORE & OHIO RAILROAD CO.

Wetzel County. Judgment Reversed, Verdict Set Aside and Action Dismissed.

Poffenbarger, Judge.

SYLLABUS.

1. A later statute, covering the whole subject matter of an earlier one, not purporting to amend it, and plainly showing it was intended to be a substitute for the earlier act, works a repeal of such earlier act by implication, even though the two are not repugnant in the usual sense of the term.

2. In such case, inconsistent intent is disclosed by the two acts, considered as entireties, but there may be no repugnancy between words, phrases or clauses, considered as such.

3. A statute, prescribing a new penalty for an old offense, does not destroy the latter nor create a new offense, but, in providing a new penalty, it impliedly repeals the old penalty, and, to that extent, modifies the antecedent law of the subject matter.

4. A later statute, imposing a fine in favor of the state for violation of provisions of an earlier one, which imposed a penal pecuniary liability in favor of the aggrieved party, but none in favor of the state, for the same unlawful act, and disclosing, by its title and provisions, intent to deal fully, comprehensively and exclusively with the subject of punishment for such offense, and not merely by way of amendment, repeals the penal clause of such earlier statute by implication.

5. As none of the several editions of the code of this state, other than that of 1868, constitute revisions or reenactments of the statutes, publication in them of a statute, repealed by implication or otherwise, does not revive it, nor give it force and effect in any

FRANKLIN v. T. H. LILLY LUMBER CO.

Summers County. Reversed and Remanded.

Williams, Judge.

SYLLABUS.

1. Plaintiff is not obliged to file his bill of particulars at the same time he files his declaration, but may do so at the term of court at which the case is tried, unless ordered sooner to do so by the court, or the judge in vacation.

2. An appearance and pleading to the general issue is a waiver of process and service.

3. Recoupment is a defense which may properly be made under the general issue upon notice given; it is not a matter to be pleaded formally.

4. A master may discharge his servant for failure to perform, in a reasonably skillful manner, the services he engaged to perform. But reasonable skill is all that is required, unless the servant professes a higher degree of skill, and contracts to perform the work in the best manner.

5. A contract for services contains the following clause, viz: "this contract is only void by some providential hinderance, or matters that are strictly beyond the control of either party, and to remain in full force for the term of five years."

HELD not to be a waiver by the master of his right to discharge the servant for want of reasonable skill to do the work he had contracted to do.

6. It is the province of the court, and not of the jury, to interpret a written contract.

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THE BAR

VOL. XVII.

FEBRUARY, 1910

No. 2

THE BAR

AN OPEN FORUM.

OFFICIAL JOURNAL OF THE

WEST VIRGINIA BAR ASSOCIATION.

Under the Editorial Charge of the
Executive Council.

Published Monthly from October to May.
Bi-monthly from June to September.

Entered as second class matter August
11, 1904, Postoffice, Morgantown,
W. Va., under the Act of
Congress March 3rd, 1879.

Price, per Copy.....\$.10
Yearly, in Advance.....\$1.00

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JUDICIAL ALCHEMY.

There are two or three articles in this number of THE BAR, relating to the administration of the law by our courts that are worth while—that are worth the time and attention of every member of the legal profession to read. They are worth more than that—they are worth a careful re-reading and thoughtful consideration.

There never was a time in the history of this Republic when this subject was more pressingly pertinent and important. The trend of the times shows to the most careless reader that the ship of state is breaking from its moorings—that its sheet anchor—the Judiciary, is being carried away by a swirl of false ideals and teachings as to the true functions of a court—tending logically and inevitably toward a judicial autocracy, which is being fostered and encouraged by many able and influential men, including members of the judiciary itself. This purpose has not, as yet, come conspicuously into view, but under our system of government, if the judiciary department wants anything, who shall say it nay? There are no checks and balances to the judiciary. They are a free lance.

We are glad to have, among the articles referred to, one from Judge Miller of our Supreme Court. Judge Miller turned aside from the onerous and exacting demands of his office to comply with our request for this article, and we appreciate it not only for this courtesy, but for the special reason that the readers of THE BAR will have a special interest in having an expression on this subject from a member of our Supreme Bench.

We are glad too, that without any quibbling, qualification or evasion, Judge Miller is willing to put himself on record in this distinct, clear cut and conclusive declaration on the point at issue:

"If the law be so plain in its terms as to need no construction, or interpretation, and the case in hand falls plainly within its purpose, every lawyer would unhesitatingly answer that such a law should be enforced according to its terms no matter upon whom it falls and regardless of the apparent hardship or injustice. This must be so, particularly in a government like ours, distributed as it is between executive, legislative and judicial departments."

Judge Miller is not less happy—but probably less precise—in defining the province of a Judge in dealing with a law that is not so plain and specific in its terms as to exclude doubt of its meaning and purpose—and here the danger lies.

It has come to be a maxim of law, that "where there is no doubt, there is no room for construction."

Where however, there is such vagueness or ambiguity in the terms of a law as to obscure its real meaning, there are only two courses open to a Judge: the one is to reject it altogether and refuse to give it any effect; and the other is to discover if possible, the spirit and purpose underlying the law and give it such practical application to the case in point as will give true effect to its spirit and purpose.

But we submit that there is no Judge so able, so wise, and so independent, that he has the right to turn any law aside from its true meaning and plain command, or to modify, amend, restrict or enlarge its language or meaning so as to give it a practical application in any case, that is inconsistent with its terms; or refuse to give it such application because, in the opinion of the Judge, the law is inexpedient, or impolitic or unjust, or works a hardship.

We believe this latter proposition is just as binding in its limitations upon a conscientious Judge who is dealing with a vague law, as is the rule that requires him to give literal application to the plain law.

But Judge Miller, is too charitable toward his profession

when he declares that "If the law be so plain in its terms as to need no construction, or interpretation, every lawyer would unhesitatingly answer that such a law should be enforced according to its terms no matter upon whom it falls, and regardless of the apparent hardship or injustice."

If that charitable declaration were truly descriptive of the attitude of the profession, just now, toward that proposition, all this discussion would be vain and unprofitable. It is because of the surprising dissent from this fundamental proposition in surprisingly high places, that this discussion becomes pertinent and important.

It has been but a few weeks since a reputable lawyer and a not less reputable Judge of one of our Circuit Courts, boldly and unequivocally avowed over his own signature in the pages of this journal, that, in effect, he would not enforce the letter of a harsh or impolitic statute, however plain in its terms, but would "abate its vigor by his rulings upon the trial," * * * and by other means known to the experienced judge." For example, Judge Doolittle (for it is to him we refer) says he "would not fine a man fifty dollars and send him to jail for six months for carrying, at the request of the owner, to a repair shop, a broken revolver that would not shoot." The Judge refers to the case of the State vs. Tabit, 52 W. Va., in which the defendant was found guilty in the Circuit Court and the Court of Appeals affirmed the decision.

Now on the same principle Judge Doolittle would not enforce the plain provisions of the more recent "pistol toting" law, which is even more drastic in its terms. That statute is absolutely prohibitive in its terms and meaning and purpose against "pistol toting" except upon a license. The legislature thought it was expedient to make it prohibitive. It is prohibitive and was plainly intended to be so.

In a recent case under this later statute, a good citizen of Randolph county, we believe, was carrying his pistol!

home after an attempt to rid the earth of a mad dog. He was a law abiding citizen, had no purpose of violating the law, and there was nothing malicious in his motive. Clearly this was a case which, according to Judge Doolittle's theory of the function of a Judge, called for the "abatement of the rigor of the law" by the Judge.

Now let us see how the two systems, the enforcement of the law as it is, and the abatement of its rigor by the Judge, work in practice.

The Circuit Court in this case administered the law as he found it, the defendant was found guilty, the penalty prescribed by the law was imposed, and the defendant applied to the Governor for a pardon, which was readily granted, and no harm was done more than ought to have been done. The forms of law were duly observed, its integrity was maintained, its majesty was vindicated and nobody was hurt.

But under Judge Doolittle's plan, by "his rulings and instructions during the trial, favorable to the defendant, the jury catching the idea of the Judge, would find him not guilty," or "he would direct a verdict;" or, "he would set aside the verdict," or, "by other means known to the experienced Judge" he would defeat the letter of the law, and turn the defendant free.

In other words he would as a Judge, first have usurped the functions of the Legislature in adjudging the law impolitic and harsh; and then arrogated a new function as a Judge in defeating the purpose of the law; and then as a Judge usurped the functions of the executive branch in exercising the pardoning power.

In short Judge Doolittle would have arrogated to himself the functions of all three departments of the government, the Legislative, the Judicial and the Executive. He would have been the whole thing. He would have usurped the whole government of the sovereign State of West Virginia, one of the United States of America!

Does Judge Doolittle recognize that in administering the office of a Judge he is administering a distinct department of the general government—the sole and exclusive function of which department is to give specific effect to the laws enacted by a co-ordinate department? Or does he assume that he is administering his own personal and individual fads and fancies as to what the law ought to be, or ought not to be—Which?

If the latter conception is his ideal, then there are three and only three, logical and inevitable short steps to the deluge: 1st. The department which the people have set up to make laws will be discredited, depreciated and defeated of its purpose.

2nd. The people will have to take their laws, not from a representative body, but from the dicta of an individual.

3d. When the American people have discovered that instead of a representative government, they are being governed by an autocrat under the title of a Judge, well—that's the end—that means revolution.

There are two other articles along this line, appearing in this issue of THE BAR, that are strictly representative of the two ideals, and ought to be read side by side. The one signed "X. Y. Z." is by one of the ablest lawyers of the State, thoroughly grounded in his profession, of wide reading and broad culture, with a clear-cut and conscientious mode of dealing with any question. His article constitutes a brief that would stand fire in any court of appeals in this land. Surely in the United States Supreme Court of Appeals, that grand tribunal which has ever stood like Gibraltar in its steadfastness to the law as it finds it, and whose patriotic firmness in this behalf makes every lover of his government feel that our chief anchor is secure and sufficient amid all the perturbations and vascillations that afflict other tribunals. Long live the Supreme Court of the United States!

The other paper to which we refer, signed by "J. R. D.,"

is by a veteran of the West Virginia Bar, who is a good lawyer and a good fellow, and has the courage of his convictions. But like many others of the older class of lawyers who have early in their careers become enamored of the common law system and the common law ideals of the functions of a Judge, that he was both a legislature and a court, he fails to appreciate that the period of judge-made-law has passed, and that we are trying an experiment in government when the three chief functions of government are distinctly, definitely and inexorably differentiated and divided, and for one of these departments to invade, encroach or usurp the functions of the coordinate department is to strike at the very foundation and existence of the government itself.

We concede to no one a higher appreciation and admiration than we have for the common law. And we recognize that it is "Judge-made-law; or in other words, that it is a summary of the principles which the human race in its history has come to recognize as having a foundation in the eternal order without legislative enactment, and which the Judges of that period of their own motion gave the judicial sanction of law.

But even in the common law era, and in the whole history of government, we cannot disguise the fact that this discretionary power of the courts was always under suspicion and more feared than any other element of government. Hence the jury system, and hence an American Republic which seeks, as the fundamental ideal upon which it is based, that each of the three departments of government shall be boxed in a separate stall ("hog-tight and bull-proof.")

There never will come a time when the American people will consent to take both their laws and the interpretation of those laws from any one man.

OUR CASE AFFIRMED.

In the last issue of THE BAR we published the syllabi of 33 cases decided by our Supreme Court, out of which number there were 25 reversed and only 8 affirmed.

We referred to this fact as an answer to those who think there is too great a limit given to the right of appeal under our judicial system.

Our good friend, Judge McWhorter of the 12th circuit, calls us to account for this comment, in an article appearing in this issue, because he thinks we mean to reflect on our Circuit Courts.

Our comment meant only what it expressed—that and nothing more. It occurred to us that if the attention of those who would restrict the right of appeal, were directed to the fact that out of 33 cases only 8 were affirmed and 25 reversed, they would admit not only the propriety of litigants taking an appeal, but also that it was a good gamble for them to take chances in the court of appeals. We would like to know what President Taft would have to say about this.

But when Judge McWhorter rapped us over the knuckles for what we thought was a very logical deduction from the one, simple fact, we did not expect him, in the same article, to reinforce and establish by additional statistics the incontrovertible justness of our comment. He traces the comparative number of cases reversed and affirmed in three vols. of several different series of the W. Va. Reports, beginning with vols. 62-65, and running back to vols. 10-13, and in only one instance does he find that the reversals do not exceed the cases affirmed.

We are much obliged to the Judge for the pains he has taken to fortify the conclusion derived from this showing.

But we have not said, and do not now say that the fact leads inevitably to the conclusion which Judge McWhorter. and not we, seems to have drawn from it, and that is that

the Circuit Courts are very unreliable in reaching right judgment. That may be a proper deduction if Judge McWhorter wants to make it. But until we do make it we wont deprive him of the responsibility for it.

We thoroughly agree with the Judge that there is a good deal of allowance to be made for the work of a Circuit Court. A Circuit Judge would be more than fallible if he discharged the labors and responsibilities laid on his shoulders day by day without making a mistake. We believe that his position is, at once, the most responsible and the most difficult that a man can occupy. The Supreme Court is working under the same high-pressure conditions, with little opportunity for calm and deliberate investigation and judgment.

The average American citizen believes nothing is settled till it is settled right. As long as the Circuit Courts and the Supreme Court are not more in accord, there is evidence of great fallibility somewhere. The more uncertain the courts the more indisposed is the litigant to drop his contention till he has reached the end of his tether. With more than half of the cases in the Circuit Courts reversed he will continue to take his chances on an appeal.

Justice of the Peace.

Sai dont keep up a corrispondens in this case it is the women on both sids that ere guunling and naoing me all the time and ther is noting in et for me. B. gave H. a chattel mortgage on all his property.

R. hus bin to M. and C. C. C. all to get free information ther no attorneys entered in the case.

Peary is entitled to the credit of having discovered the Geographic Society anyhow.—*Cleveland Leader*.

SOME LEADING QUESTIONS.

We believe that Judge Doolittle is radically wrong in some of his notions as a Judge; but we admire him as a man for his manly frankness and courage in defending a very desperate position.

And we have never been so stilted in our notion of any debatable question that we were not willing to hear the other side. We have learned sometimes that when we were most certain of being right we were most conclusively wrong.

We are not only willing but we are very curious to learn by what arguments or reasons one who maintains the attitude that Judge Doolittle does toward his office, justifies himself. We are anxious to present these reasons and arguments to the readers of THE BAR that they may weigh and consider them.

We are sure that Judge Doolittle is just as able and willing to give a reason for the faith that is in him as we are to have it, and there are a few leading questions we hope he will have the goodness of heart to answer:

1. Does he, in administering his office as a Judge regard himself as administering a department of the government, whose sole function is to give specific effect to the laws enacted by a co-ordinate department; or does he regard the Judges of the Circuit Court as a kind of club of individuals, each having plenary power to administer his own fads and fancies as individuals, independently of any relation to the recognized functions of their own and co-ordinate departments as a system of government? Which?

2. Does he not believe that the integrity of the three departments of our government is necessary to its very existence?

3. Does not any encroachment of the judicial upon the functions of the legislative department tend to lessen both the authority and certainty of law, (i. e.) will the people ac-

cept a divided authority with the same respect and obedience as if it were single?

4. Has not a legislature the right, and is it not expedient, in some cases, in order to prevent evasions, to make a statute absolutely prohibitive, even knowing and anticipating that it will work a hardship in exceptional cases (as for instance in regulating the liquor traffic)? If it has this right, and does make a statute absolutely prohibitive in letter and spirit, knowing that it must work a hardship in exceptional cases, but evidently intending thus to put the general weal above the individual weal, does Judge Doolittle, as an officer of the government entrusted with the responsibility of giving exact effect and operation to the legislative will, assume that he has a right to take issue with the expediency of such law and abate its rigor in any case?

5. He will answer the above question if he will answer this specific illustration: A druggist violates the law if he sells whiskey without a physician's prescription. A man staggers into his store, weak, faint and bleeding from injuries received in an accident. His friend (not a physician) calls excitedly for a glass of whiskey. The druggist believing that a life is in jeopardy, hands out the whiskey. The injured man drinks it, is revived, his friend pays for the whiskey and takes him away. The druggist is haled into Judge Doolittle's court to answer an indictment founded upon the foregoing circumstances. What would Judge Doolittle do with the case?

6. If Judge Doolittle believes his own sense of integrity, singleness of purpose and experience as a Judge, justifies him in abating, modifying or in any way diverting the operation of a statute from its literal purpose; what would he think of the propriety of the precedent he had made if as an American citizen he had to take his own medicine from a successor who had neither integrity, character, experience, and probably a personal motive for "exercising his judicial discretion." All Judges are not Doolittles: would he give

a certain measure of "Discretion" to the Doolittles and a certain other measure to the Dooley's?

We do not want to overburden the Judge; these questions are designed to draw from him his exact view point, and with the sincere desire and single purpose, not simply to test him, but to understand him, and those of the same faith. If they appear lacking in any degree of a respectful spirit, purpose, or temper, we do not intend it.

AN EASY ONE.

Tuberculosis is ravaging the human race more than any other disease. The mortality from it is said to be on the increase.

Yet it is a preventable and curable malady.

Recently a gentleman in Boston put up a standing prize of \$100,000 for the discovery of a cure for tuberculosis.

We thought that an easy one, and concluded to go for the prize.

We sat down and wrote him this note:

"We have a cure for tuberculosis, that has never been known to fail. It is both a preventive and a cure, and has proved itself so that no physician will question it. Moreover, it is as simple as effective, to-wit:

Breath pure air all the time, and breath bad air none of the time.

This is nature's remedy, the best and only remedy, and we assume, that having complied with your condition you will promptly forward that little matter of \$100,000. Send at our risk, by check, postal order, or draft.

We have not yet received the prize, but having fairly won it, of course it will come along by and by.

Many physicians and scientists will continue to poke around among the mysterious and occult things for a remedy

but they can't beat nature. Tuberculosis is nature's penalty for the indecent and inexcusable habit of taking dirty air into the lungs; just as dyspepsia is the penalty for taking improper food into the stomach. And the only cure for either is to quit.

Nature can be conciliated but she can't be circumvented. She says to the victim of tuberculosis "you deserve all you got," but if you will reform and be decent you shall be restored. You pay nothing for the remedy. Good air is abundant and costs nothing. If you won't take it, you may die like a hog."

FROM A JEWISH STANDPOINT.

We acknowledge the receipt of a lengthy and very interesting communication from a member of the Jewish race on the complications of the "White Slave" problem.

His purpose is not to defend or to deny the fact, that although females of his own race have maintained a high character for personal virtue, they have been caught in the maelstrom of this horrible vice as it is conducted in New York. He details the manner and the methods by which the immigrant Jewish girl is inveigled into the meshes of the promoters and robbed of her virtue; and the high price of the Jewish victim is evidence of the superior regard her race has for female virtue. But he brings out the additional fact that nothing can defeat the devices and deceptions of the agents of this traffic as practiced on the new-comer at the port of New York.

The writer of this article is a West Virginia lawyer, but evidently familiar with the conditions in New York, and if our space would permit, we would gladly give place to his article, which throws new light on this subject. At some other time we may be able to use it.

THE MISTRESS OF THE COMMERCIAL WORLD.

A most interesting and instructive article descriptive of the city of London and disclosing the secret of her mighty growth and the supremacy that city has attained in the commercial world, has recently appeared in one of the magazines.

There is so much wisdom in the article and the writer takes such an unusually broad view of present day relationships between the great cities and nations of the world that we are tempted to reprint it. Take this single excerpt, and how much suggestive political economy is condensed into the few facts here marshalled:

"London is the counter of the world. And the old City Corporation, with its banks, its brokers, its offices and machinery for exchanging the products of India with Africa, and of China with America, is the clearing-house of us all. England is the only great nation which opens its doors to the trade of the world, unhampered and unrestrained by taxes, tariffs, imposts or octroi. White, black, yellow, and red, the followers of Christ, of Buddha, of Mohammed and Confucius, all send their wares, in consequence, to the ports which invite them. For trade hates barriers. It will go around the world to avoid a tariff wall. And because of this fact Great Britain is the counter across which the wealth of the world is exchanged. Here the products of every clime are freely swapped. The exports of America come to the ports of England, to be reshipped in turn to the ports of South America, Africa, and Asia. The products of the Orient take the same course, and for the same reason. Is it not that England has subsidized her merchant marine. Is it not that trade follows the flag. It is the freedom with which men trade across an open counter that has given Great Britain supremacy of the seas. It is this that has built up her cotton and her wollen trade, her cutlery, and tool industries. It is this that has given her wares a welcome

entry into every port. For no people are so ignorant that they do not prefer to trade with those who trade with them. And no shipping can be profitable where bottoms are empty one way. There can never be any commerce, and there never has been any commerce where all of the profits are made by one party."

LIMITATIONS OF JUDICIAL DISCRETION.

By Judge Miller of the Supreme Court of Appeals.

TO THE BAR:—

I am requested to respond to the question, what are the limits of judicial authority where a law, precise in its terms, if literally enforced, would be impolitic or would work great hardship, or injustice?

English judges and Roman jurists from the earliest times were frequently confronted with this question, and it has many times confronted our own courts and judges in the development and administration, under state and federal constitutions, of our own peculiar system of jurisprudence.

If I may be permitted to digress a little from the main question, I wish to say that I have not been able to appreciate the pertinency of this question to Mr. Roosevelt's criticism of the Jacobs case. 98 N. Y. 98. I do not understand him to have affirmed that a judge may, or of right ought to wholly disregard positive law in order to administer social justice. His position was that if the judges had not been, as I think he erroneously assumed they were, "men without any sympathetic understanding, or knowledge of the needs and conditions of life of the great mass of their fellow countrymen. * * * * If they had understood 'how the other half lived', etc., they would have rendered no such decision as

was rendered." He erroneously assumed, I think, that "it was this lack of knowledge and the attendant lack of sympathetic understanding that formed the real barrier between the judges and a wise judgment." I think the judgment of the court in that case disclosed a very wide knowledge and sympathetic understanding on the part of the Judges, of all the circumstances and conditions of those affected by the statute, and of which the court took judicial notice in pronouncing what I conceive to have been a wise and just judgment. The effect of that judgment was that the statute involved was an unreasonable exercise of the police power, inhibited by the constitution, and to discharge the petitioner from imprisonment for the crime of which he stood convicted, of employing one of the several rooms in the tenement occupied by him for the manufacture of cigars, a business rendered criminal by the statute only when so carried on in a certain class of tenements in cities of over 500,000 inhabitants. The power of a court of competent jurisdiction to thus nullify a statute for infraction of the constitution is no longer an open question in this country, and this was all that the New York Court did. If the decision had been otherwise the petitioner, a poor man, would have been driven out of his house and probably out of business, because unable, on account of the additional expense of rents, to carry on his business elsewhere.

Now as to the main question. May a court or judge in the administration of justice disregard a plain, positive provision of law where its enforcement according to the strict letter would work hardship or injustice? My answer is yes and no. If the law be so plain in its terms as to need no construction, or interpretation, and the case in hand falls plainly within its intent and purpose, every lawyer would unhesitatingly answer that such a law should be enforced according to its terms no matter upon whom it falls, and regardless of the apparent hardship or injustice. This must

be so, particularly in a government like ours, distributed as it is between executive, legislative and judicial departments.

But where the law is otherwise, is ambiguous, or of doubtful construction or application, courts and judges for centuries have exercised wide judicial discretion, and have applied well recognized rules of equitable construction, the rule of presumptions, the doctrine of reasonableness, and have even resorted to legal fictions in order to prevent wrong and injury.

My views on this question are so fully covered by the Hon. Le Barron B. Colt, United States Circuit Judge for the first circuit, in his annual address, before the American Bar Association, in 1903, on the subject "Law and Reasonableness," that I have determined to confine my response mainly to quotations from that admirable address. The conclusion of the speaker, are so fully supported by reference to and copious quotations from works of history, and from legal texts and judicial decisions as to leave little room for controversy. The texts of this address are familiar maxims: "Law is the perfection of reason." "Reason is the soul of the law; and when the reason of any particular law ceases, so does the law itself." "The reason and spirit of laws make law, not of particular precedents." "Reason is the life of the law; the common law itself is nothing but reason."

He quotes from Chancellor Kent, that "a statute is never to be construed against the plain and obvious dictates of reason." He affirms on high authority that "The courts have also called in aid this doctrine of reasonableness to justify a departure from the strict rule of law." He says, "in respect to legislation it will be found that the judiciary, through its power of construction and interpretation has acted as a safe guard against the enforcement of unreasonable statute laws." We are told in this address how the "Roman jurisconsults resorted to fictions for overcoming the severity of legal rules, and reconciling the letter of the law within common sense

and justice." In the same connection the speaker says: "When large numbers of foreigners flocked to Rome, the strict rule of the Civil Code that no one but a Roman citizen could maintain suit became harsh and unjust; whereupon the Roman lawyers invented the fiction that if a foreigner averred he was a Roman citizen, the defendant could not traverse the allegations." He also quotes from Dicey as follows: "The fictions of the Courts have in the hands of lawyers such as Coke served the cause both of justice and of freedom, and served it when it could have been defended by no other weapons. For there are social conditions under which legal fictions or subtleties afford the sole means of establishing that rule of equal and settled law which is the true basis of English civilization." He also says: "that the English judges and Roman jurists have really employed fictions in a much broader sense, for the purpose of changing, extending and modifying the rules of law in order to bring them into harmony with social progress and the actual concerns of life."

Mr. Blaine is reported to have said that the creation of our own state was sustained by legal fictions. 2 Morse Abraham Lincoln ("American Statesmen" series). 181.

Quoting again: "Before the division between the legislative and judicial powers of the government had become so sharply defined the Courts, as we have already pointed out, rigorously protested against the authority of the legislature to enact a valid law which was in violation of natural justice and common sense. Such expressions are found in judicial decisions from Lord Coke in *Bonham's case*, who declared that 'when an act of Parliament is against right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such act to be void,' down to Mr. Justice Miller in *Loan Association v. Topeka*, and Mr. Justice Brown in *Holden v. Hardy*."

The speaker also refers to the fact that in early times the courts in order to make statute law reasonable resorted to

the doctrine of **equitable construction**, and says: "Upon this principle they disregard the letter of the statute, and extended its provisions to cases 'within the same mischief', or they excepted from the statute, though covered by its terms, other cases on consideration of justice and right reason."

The doctrine of "equitable construction", and of "presumptions" is also discussed with reference to English cases and also with reference to *Trinity Church v. United States*, and *United States v. Kirby*. "The question at issue" in the *Trinity Church* case, says he, "was the applicability of the Alien Contract Labor Law to a Clergyman who came to this country to enter the service of a church." Although it was conceded that the case came within the letter of the law the court said: "It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within the spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application." The quotation from *United States v. Kirby*, is as follows: "All laws should receive a sensible construction * * * . The reason of the law in such cases should prevail over its letter. The common sense of man approves the judgment of Puffendorf that the Belognian law which enacted 'that whoever drew blood in the streets should be punished with the utmost severity did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. The same common sense accepts the ruling cited by Plowden, that the statute of 1st Edw. II., which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire for he is not to be hanged because he would not stay to be burned."

"Such" says this Judge, "Has been the attitude of the courts and lawyers in the ever existing struggle between the rules and positive law and advancing civilization. They have striven to keep the law in harmony with social progress, to make it more reasonable as social necessities and public

sentiment have demanded. Ever recognizing that 'the matter changeth, the custom, the contracts, the commerce, the disposition, educations and tempers of men and societies', they have conceived theories, invoked doctrines, and inaugurated instrumentalities to relieve the situation. They have carried on judicial legislation from the infancy of the law in order that it might advance with society. By the adoption of broad and elastic rules of interpretation they have maintained, in large measure, the supreme law of the land in harmony with national growth; and they stood as a barrier against the enforcement of capricious and arbitrary laws enacted by the great remedial agency upon which the community now mainly relies."

I commend this whole address to those who would pursue the subject further.

If more is needed I refer the enquiry to the many decisions in Virginia and in this State digested in 12 Ency. Dig. 759-777, where the rules of construction and interpretation referred have been many times invoked and applied.

As was said in olden times: "The Sabbath was made for man and not man for the Sabbath"; so we may say in this day, the law was made for man, not man for the law.

WILLIAM H. MILLER.

"Pray, my good man," said a judge to an Irishman, who was a witness on a trial, "what did pass between you and the prisoner?"

Oh, then, plase your lordship," said Pat, "sure I sees Phelim atop of the wall. 'Paddy!' says he. 'What?' says I. 'Here!' says he. 'Where?' says I. 'Whist!' says he. 'Hush!' says I. And that's all, plase your lordship."

There seems to be a lot of unemployed veracity in politics still.—*Washington Post*.

VIEWED FROM THE BENCH OF THE CIRCUIT COURT.

EDITOR "THE BAR":—

Just a word, please, touching an editorial mention in the last issue of THE BAR of the large percentage of reversals in the list of new decisions of the Supreme Court of Appeals reported in the same issue. You say editorially, "Those who think there is too great a limit given to the right of appeal under our judicial system, will probably change their minds if they will look at the number of reversals in the list of cases reported in this BAR. And this list is not exceptional, but shows the usual proportion."

Putting it in the mildest way this editorial at least contains a suggestion or intimation that there is some deficiency in the circuit judiciary of the State, and that, for the protection of the rights of litigants, the widest latitude should be given for appeals. While I am not personally sensitive about such matters, yet I feel that, in the interest of that public confidence that should be, as far as possible, reposed in the judiciary, your statement that this small list of decisions so reported was not an exception, but showed the usual proportion of reversals, should be corrected. I don't think it is supported by the facts. I have not had time to examine all of the W. Va. Reports, but I have examined sufficient of them to give what I think are some fair tests.

Take volumes 62 to 65, inclusive of the Reports and we find 49.7 per cent reversals and 50.3 per cent affirmances. Then go back twenty years, when the work of the circuit judges was vastly lighter, and taking volumes 30 to 33, inclusive, we find the reversals to be 57 per cent and affirmances 43 per cent. Go back when the work was still easier and take volumes 20 to 23, inclusive, and the reversals stand 55 per cent to 45 per cent affirmances. Then go back still farther, when the work of the circuit judges was play com-

pared with what it is today, and, taking volumes 10 to 13, inclusive, we find the reversals are 54 per cent to 46 per cent affirmances. In making these tests no notice was taken of cases of original jurisdiction in the Supreme Court, of course, neither was any taken of cases affirmed in part and reversed in part. Now, the list of reported cases in the BAR referred to show 72 per cent reversals and 28 per cent affirmances. Tried by the tests I have submitted, your statement that this list is "not exceptional, but shows the usual proportion," is very inaccurate, and does injustice to the circuit judges of the State—a thing, I am sure, the BAR never intended. I know the circuit judges need spanking occasionally, and THE BAR is a good "family doctor;" but, for goodness sake, don't put nails in the shingle!

It sometimes happens that there will be a "run" of cases in which the per centum of reversals will be exceptionally large, and vice versa. For instance, in the January, 1909, BAR the list reported showed 61 per cent affirmances and 39 per cent reversals. Just why these "runs" of reversals or affirmances thus come, I do not know; but it is a matter of common observation that they do often run this way. It has been suggested by some one that it was because the signs of the moon were wrong either when the circuit judges or when the supreme judges passed upon the cases. But, seriously, taking the tests I have made, it will be seen that, notwithstanding law is practiced more closely than ever before, and the work of the circuit judges has enormously increased, and more troublesome questions are being raised because of the more complex character of the industries of the State with the mines, railroads, electrical machinery, manufacturing, lumbering, oil and gas interests, and innumerable other things scarcely dreamed of in the litigation of a few decades ago, the percentage of reversals is actually lower in the last four volumes of our Reports than in either of the other groups mentioned. Then, again, it must be remembered that the judges of the appellate court examine

cases more closely than formerly when they are presented upon applications for appeals or writs of error, and large numbers of them are rejected. All of these are really affirmances of the lower courts. Add these to the cases affirmed upon actual hearings, and the percentage of reversals will sink still lower.

But let me say here that I fully concur in your idea that full opportunity should be given for appeals. All judges make mistakes. Even the Supreme Court of Appeals, in trying to correct its own mistakes has, along some lines reversed itself with bewildering frequency. And when it is perceived how many cases the circuit judges are required to decide, with what feverish haste they are compelled to work to avoid being overwhelmed and how many vital questions they are compelled to decide off hand the only wonder is they don't make more mistakes and are not reversed more frequently than they are. The work of the circuit judges twenty-five years ago was as a child's play compared to what it is today. One need only refer to the records to verify this statement. The law is practiced so closely today that every question possible is raised. Very recently I heard an eminent lawyer of this state say that he had just had occasion to examine some court records made by some of the earlier judges of Virginia who were then and still are regarded as the great judges of that day, and so crude and imperfect had he found the work done by them that it would not pass muster in any of our courts of this day. Under the great pressure of business crowding constantly upon the circuit judges, they will necessarily and unavoidably continue to make mistakes, and sufficient opportunity should be given litigants to have these mistakes corrected, as far as may be, by appeals.

I believe, too, that in some quarters an unfortunate practice has unconsciously crept into our trials through the legal profession that causes many appeals to be taken that otherwise would be unnecessary. Is it not true that too many

lawyers, in their practice, give more attention to the preparation of their cases for "going up" than they do to the assistance of the circuit judge in reaching correct conclusions? Do not too many lawyers lose sight of their duty and their obligation professionally to "carry a light to the court"? Some lawyers have a mania for "going up," and in their practice this thought has possibly too large a place in their minds. A little more careful and sincere assistance by the lawyers to the circuit judge to enable him to get right and keep right, rather than so much effort to entrap him with armfuls of "instructions" and otherwise, so as to "take him up", and a little more willingness on the part of some of the judges to "receive the light," would obviate the necessity of appeals in numerous instances.

I feel that I am at liberty to speak freely along this line, because I am satisfied that the different bars of my circuit are as free of lawyers who would seek undue advantage of the judge to lay ground for appeals as any bars of the State; and I feel, too, that I am justified in uttering this word in defense of the circuit judge, because the Lord knows that his yoke is not easy, and his burden is not light.

J. C. McWHORTER.

Buckhannon, W. Va., January 10, 1910.

A big-hearted Irish politician in a Western city had just left a theatre one night when he was approached by a beggar, who said:

"Heaven bless your bright, benevolent face! A little charity, sir, for a poor cripple."

The politician gave the man some coins, saying: "And how are you crippled, old man?"

"Financially, sir," answered the beggar, as he made off.—
Lippincott's Magazine.

JUDICIAL DISCRETION.

TO THE BAR:—

A recurrence to ancient doctrines is still the safest guide.

In *St. Louis R. R. Co. vs. Taylor*, 210 U. S. page 295, the Supreme Court construing the Safety-Appliance Act uses this language: "We have nothing to do but to ascertain and declare the meaning of a few simple words in which the duty is described. It is enacted that no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard. There is no escape from the meaning of these words. Explanation cannot clarify them, and ought not to be employed to confuse them or lessen their significance. The obvious purpose of the legislature was to supplant the qualified duty of the common law with an absolute duty, deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it. It is urged that this is a harsh construction. To this we reply that, if it be the true construction, its harshness is no concern of the courts. They have no responsibility for the justice or wisdom of legislation, and no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional power of the law-making body. It is said that the liability under the statute, as thus construed, imposes so great a hardship upon the railroads that it ought not to be supposed that Congress intended it. Certainly the statute ought not to be given an absurd or utterly unreasonable interpretation, leading to hardship and injustice, if any other interpretation is reasonably possible. But this argument is a dangerous one, and never should be heeded where the hardship would be occasional and exceptional. It would be better, it was once said by Lord Eldon, to look hardship in the face rather than break down the rules of law."

This same principle has been enforced frequently by the Supreme Court of U. S. Notably in the construction of the Sherman Anti-Trust Laws, and those which relate to penalties imposed by Acts of Congress.

Of course there is judicial discretion. But what is it? "Ability to discern by the right line of law, and not by the crooked cord of private opinion which the vulgar call discretion." Coke Litt. 227b.

This is not the kind of discretion which the Supreme Court of Alabama, in *re Chase* 43 Ala. 310, had in mind when it quoted: "The discretion of a Judge is the law of tyrants; it is always unknown; it is different in different men; it is casual and depends upon constitution and passion. In the best it is often, at times, capricious; in the worst, it is every vice. folly and madness to which human nature is liable." The above was quoted from Lord Camden, who also observed; "the most odious and dangerous of all laws would be those depending on the discretion of Judges."

"In *Osborne vs. U. S. Bank*, 9 Wheaton, 733, Chief Justice Marshall held, "courts are mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion; a discretion to be exercised in discerning the course prescribed by law, and when that is discerned it is a duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature, or in other words, to the will of the law."

West Virginia has defined discretion as the exercise of a sound judicial judgment, in the interest of justice and prudence. *Rose vs. Brown*, 11 W. Va. 122.

We must discriminate between the duty of a court to enforce a law, when its meaning and intent is plain, and the duty of the court in construing the law. For instance, a Federal law imposes a penalty for importing a laborer from

abroad, but the Supreme Court of the U. S. held that when Trinity Church at New York engaged a clergyman for its pulpit, and brought him over from Europe, the Church was not amenable to that law; even though the prosecution cited Texts of Scripture with regard to the laborer and his hire. *Church vs. United States* 143 U. S. 462. On the other hand, in the days of Re-construction, a colored Judge in South Carolina held that a man could not be punished for killing his wife, because the law of that State inflicted a penalty only where one "man should kill another." In W. Va., it has several times been pointed out that the "letter killeth"; and that a thing might be within the letter of a statute, and not within the purview. Thus, Blackstone pointed out that the English statute against "the letting of blood in the streets" was aimed at street fighting, and did not apply to a physician, who bled a man to save his life.

So various are the circumstances and the facts that are constantly presented to the courts, that we should be the more impressed with the necessity of wisdom, breadth and learning for that first place in secular affairs; but we think, that while there may be apparent exceptions, it will be found that no court has a right to dispense with the requirements of a command of the law-making power in a case to which it is clearly applicable, and on the other hand, no Judge will strain the law to apply it to a case not intended by the law-making power.

Our "gun-toting" statute does not apply to toy pistols, or to the carrying of portions of a broken weapon. We conceive that a man in possession of a loaded pistol would be outside of the intent of that law, if for instance, he should disarm a felon, and carry a pistol to the nearest officer. A party of ladies playing Bridge for a ribbon or a tea-pot, would hardly be liable for gaming, even if they should cheat, as might possibly happen.

There is such a thing also as legal sympathy, where the law properly leans in favor of a person without fault, who

might be within the letter, but we beg to suggest that if the courts change or refuse to enforce the plain and established laws, then the last hope of the Republic is gone. "Where law ends, tyranny begins." Indeed, legislation is now loose enough. Where would it be, if the legislatures felt that the courts would act as an over-ruling providence, to correct every unwise enactment?

The saving quality of common sense cannot refuse obedience to law.

X. Y. Z.

JUDICIAL DISCRETION.

As Measured By a Common Law Yard Stick. TO THE BAR:—

The question which you have brought to the fore, and which Judge Doolittle (to the honor of both head and heart) discussed in your January number, is not a new one. It is, indeed, quite an old one. It was up and in dispute in England, four hundred years ago—before ever a court existed in America—away back in the time of that bad individual King Henry VIII. So great and good a man as Sir Thomas Moore, the lord chancellor of England, the immediate successor of the renowned Cardinal Wolsey, took active participation in the discussion of the identically same question, then agitating all the eminent judges and lawyers of the realm, and declared the emphatic opinion that the judges of the law courts should exercise their discretion in mitigating the rigors of the law, and he thought they were in conscience bound to do so. I copy from Roper's Life of Sir Thomas Moore, the following quaint passage:

"And as few injunctions as he granted while he was Lord Chancellor, yet were they by some of the judges of the law misliked, which I, understanding, declared the same unto Sir Thomas More, who answered me, that they have little

cause to find fault with him therefore. And thereupon caused he one Mr. Crooke, chief of the six clerks, to make a docket, containing the whole number and causes of all such injunctions, as either in his time had already passed, or at that present time depended in any of the King's Courts at Westminster before him. Which done he invited all the judges to dinner with him in the Council Chamber at Westminster, where after dinner when he had broken with them what complaints he had heard of his injunctions, but moreover showed them both the number and causes of every of them in order so plainly that, upon full debating of those matters, they were all enforced to confess, that they, in like case. could have done no otherwise themselves, then offered he this unto them, that if the justices of every court, unto whom the reformation of rigour of the law, by reason of their office, most especially appertained, would, upon reasonable consideration, by their own discretions (as they were, as he thought, in conscience bound) mitigate and reform the rigour of the law themselves, there should from thenceforth by him no more injunctions be granted."

The law judges, however, refused to yield, or recede from the rule of rigidity. Whereupon the good Sir Thomas bluntly told them, as his biographer informs us, that they could not thereafter blame him for issuing injunctions. Judge Story, in his *Equity Jurisp.* (1 Vol. § 51, note), refers to the incident, as part of the history of the origin of the equity jurisdiction of courts of chancery. It is cited here to show that, long before Blackstone laid down the rule, quoted by Judge Doolittle, as to interpreting a law by "the reason and spirit" of it, there was eminent authority for the principles which Judge D. advocates. *Verba intentione debent inservire* is a maxim of ancient and honorable standing, and is binding even upon the law courts. The typical Bolognian law, which declared that, who ever drew blood in the streets should be punished with extreme severity, was surely construed right-

ly when it was held that it did not apply to the case of a surgeon who opened the vein of one who fell in the street in a fit. So, that the English statute which enacted that, one who breaks prison shall be guilty of a felony, did not extend to a prisoner who breaks out when the prison was on fire; "for he is not to be hanged because he would not stay to be burnt."

Many modern instances might be cited where the rigid rule of *ita lex scripta est* has been and had to be disregarded, in order to avoid manifest injustice—all decided by the law courts, upon "discretion" of the judges, and in consonance with the rule of the spirit and reason of the law. Take *State v. Bolden*, 31 So. Rep. 393. A La. statute made it a crime to shoot at a person with intent to kill, making no exception for shooting in self-defense. Yet such shooting was decided into the statute, and its rigor abated—and rightly, too, as all concede. But these "modern instances" are too numerous for citation, and we pass them. Only that it is worthy of mention that the learned argument of Judge Poffenbarger, in deciding *State v. Braxton Co. Court*, 55 S. E. 382, goes to show, upon strong authority, a principle, back of all constitutions and statutes, authorizing and enjoining our law judges to do justice, even as against the express letter of the law.

Is all that large learning of ours, about this law to be construed liberally and that one strictly, but mere meaningless babble? It must be, unless the law, its very self, recognizes as existent in our law judges the equitable spirit and the power of adapting judgment to the situation and circumstances of the particular case.

J. R. D.

Just to show its democratic spirit the Sugar Trust condescends to treat with the United States Government as an equal.—*Chicago News*.

**THE PROPOSED STERILIZATION OF THE UNFIT.
JUDGE FOSTER'S PAPER ON THE CURE FOR HEREDITARY CRIME.**

By Archibald Watson Robinson, Esq., Editor of "Bench and Bar."

Pearson's Magazine for November very properly gives precedence of position to an interesting and suggestive article by Judge Warren W. Foster, of the New York Court of General Sessions, under the title "Hereditary Criminality and Its Certain Cure." It is probable that few men are so well qualified as is Judge Foster, both by research and experience, to treat convincingly the subject discussed, and he has presented much that is worthy of the most solicitous consideration. The problems which criminologists essay to solve must also beset in a lesser degree every thinking man who is concerned—and who is not?—over the alarming increase in crime in proportion to population. The rigor of the penal laws during the past half century has certainly not diminished; the likelihood of apprehension and punishment of persons who commit crime has certainly increased. But still we are shown that whereas in 1850 there was only one convict to every 3,400 of population in the United States, in 1890 there was actually one prisoner to every 750 inhabitants. During the past thirty years, we are told that our criminal population has increased, relatively to population, by one-third. Quite conclusive proof, this is, that under our penal system of dealing only with the persons of the immediate offenders, crime is multiplying with deplorable rapidity instead of yielding to the treatment prescribed by or possible under the existing laws. We are next shown that crime is far more prevalent in the children of criminals than in the offspring of normal persons, and then our author presents most carefully collocated statistics and examples, from which is deduced the view that hereditary influences rather than environment are the most potent producers of crime. The remedy, the sterilization of the adult criminal, is rather suggested than urged, attention being called to the fact that two years ago (March, 1907) the Indiana legislature passed an act giving the medical and surgical experts of state penal institutions the right to perform operations for the prevention

of procreation upon all incorrigibles in crime. Our author tells us that since the passage of this act more than 800 persons in the State of Indiana have been thus asexualized, and, according to competent medical testimony, with entire success. According to Judge Foster, also, bills similar to the Indiana enactment have passed the legislatures of Oregon and Connecticut, and have been introduced in Illinois, but have as yet failed to become laws. Many influential newspapers throughout the country, as well as most of the medical societies which have expressed themselves, appear to favor this somewhat drastic measure of social economy, for which it is claimed that—"Could such a law be enforced in the whole United States, less than four generations would eliminate nine-tenths of the crime, insanity and sickness of the present generation in our land."

Judge Foster's Solution.

Four methods have been commonly suggested: **Emasculation**, a rigid regulation of marriage which shall prohibit the criminal from mating, segregation or coloniaztion of the criminal, and lastly, **vasectomy**. The first method works such an entire psychical and physical change in the individual that its contemplation naturally shocks the mind, and, public opinion, in all probability, will never approve its legal adoption. Of the second method, it may be said that unfortunately **marriage** is not necessary to propagation. It may be possible, by legislation to diminish marriage, but doubtless the effect would be to increase the number of illegitimates, thus augmenting instead of diminishing the "mischief." The segregation or "colonization" of the criminal, thus making impossible the commingling of the sexes, is approved chiefly by those who have apparently never known of vasectomy. As a matter of fact, it has been tried by the law for a time to which the memory of man runneth not to the contrary—for what else is it than imprisonment within four walls, and has this not already proved its inefficiency?

Coming then to vasectomy, a subject in which an increasing number of State legislatures is becoming interested, the physician furnishes a method of sterilizing the criminal with no impairment of the sexual function, merely the blocking of the minute canal (the vas) traversed by the fecundat-

ing element of the male, thus wholly preventing impregnation. As proof of their contention that this simple process impairs neither sexual virility nor its instinctive manifestation and accomplishment, the medical profession points to the robust sexual health of thousands of men who have been unwittingly sterilized through disease, and who never suspected that their procreative functions were not perfectly normal until their marriages proved barren. They also point to the experience of those upon whom vasectomy has been performed, among them married men who chose this means rather than criminal abortion, to prevent the transmission to offspring of their hereditary taints, such as insanity and infectious disease.

Vasectomy is known to the medical profession as "an office operation" painlessly performed in a few minutes, under an anaesthetic (cocaine), through a skin cut half an inch long, and entailing no wound infection, no confinement to bed. "It is less serious than the extraction of a tooth," to quote from Dr. William D. Belfield, of Chicago, one of the pioneers in the movement for the sterilization of criminals by vasectomy, an opinion that finds ample corroboration among practitioners.

Nor is this method entirely academic. It has been tried. It is in actual operation in at least one State. In March, 1907, the Indiana Legislature passed a bill thus authorizing sterilization, which he quotes in full.

Upward of 800 persons in the State of Indiana have thus been asexualized, and, according to competent medical testimony, with entire success.

Bills substantially similar have passed the legislatures of Oregon and Connecticut, and have been introduced in Illinois, but, for one cause or another, have not become laws. Upon the law proposed for Connecticut, one of the New York journals makes this pointed comment: "Could such a law be enforced in the whole United States, less than four generations would eliminate nine-tenths of the crime, insanity and sickness of the present generation in our land. Asylums, prisons and hospitals would decrease, and the problems of the unemployed, the indigent old, and the hopelessly degenerate would cease to trouble civilization. In the breeding of horses and cattle, the survival of the fittest, only, is made possible; and the human race should be protected in

the same manner from the perpetuation of undesirable and dangerous tendencies and qualities. It is to be hoped that this law will pass, and be enforced in Connecticut; and that it will become universal."

There appears to be a wonderful unanimity of favoring opinion as to the advisability of the sterilization of criminals and the prevention of their further propagation. The **Journal of the American Medical Association** recommends it, as does the Chicago Physicians' Club, the Southern District Medical Society, and the Chicago Society of Social Hygiene. The **Chicago Evening Post**, speaking of the Indiana law, says that it is one of the most important reforms before the people, that "rarely has a big thing come with so little fanfare of trumpets." The **Chicago Tribune** says that "the sterilization of defectives and habitual criminals is a measure of social economy."

The sterilization of convicts by vasectomy was actually performed for the first time in this country, so far as is known, in October, 1899, by Dr. H. C. Sharp, of Indianapolis, then physician to the Indiana State Reformatory at Jeffersonville, though the value of the operation for healing purposes had long been known. He continued to perform this operation with the consent of the convict (not by legislative authority) for some years. Influential physicians heard of his work, and were so favorably impressed with it that they endorsed the movement, which resulted in the passage of the law now upon the Indiana statute books. Dr. Sharp has this to say of this method of relief to society: "Vasectomy consists of ligating and resecting a small portion of the vas deferens. This operation is indeed very simple and easy to perform; I do it without administering an anaesthetic, either general or local. It requires about three minutes' time to perform the operation and the subject returns to his work immediately, suffers no inconvenience and is in no way impaired for his pursuit of life, liberty, and happiness, but is effectively sterilized. I have been doing this operation for nine full years. I have two hundred and thirty-six cases that have afforded splendid opportunity for post-operative observation and I have never seen any unfavorable symptom. There is no atrophy of the parts, no cystic degeneration, no disturbed mental or nervous condition following, but, on the contrary, the patient becomes of a more sunny disposition,

brighter of intellect, and advises his fellows to submit to the operation for their own good. And here is where this method of preventing procreation is so infinitely superior to all others proposed—that it is endorsed by the subjected persons. All the other methods proposed place restrictions and, therefore, punishment upon the subject; this method absolutely does not. There is no expense to the State, no sorrow or shame to the friends of the individual as there is bound to be in the carrying out of the segregation idea.”*

Dr. Rentoul, of Liverpool, has given much thought to this subject, and, more than others, has contributed to literature on this question, and he advocates the authorization of sterilization by law.

Sir John McDougall, Chairman of the Asylum Committee of the London County Council, has said: “Some day we shall come to the conclusion that some physical means should be employed to prevent the unfit from producing children.”

Earl Russell, of London, is quoted as saying: “I think it admits of little doubt that if the ruling classes in the country, in Parliament, and in the law were composed entirely of people of adequate medical knowledge, some such remedy as this suggested would soon become a law of the land.”

Dr. Bernardo, whose work on behalf of the children of the submerged tenth in London has given him world-wide fame, left on record these words: “Some step will have to be taken in the near future if we are to protect the nation at large from a large addition of the most enfeebled, vicious, and degenerate type.”

Dr. Bevan Lewis, of England, says: “Nothing short of such radical means can stem the tide of degeneracy.”

Dr. Barr, in his work “Mental Defectives,” says: “Let asexualization be once legalized, not as a penalty for crime, but as a remedial measure preventing crime and tending to future comfort and happiness of the defective; let the practice once become common for young children immediately upon being adjudged defective by competent authority properly appointed, and the public mind will accept it as an effective means of race preservation. It would come to be regarded, just as quarantine, simple protection against ill.”

Lydston, in his “Diseases of Society and Degeneracy,”

from which I have already quoted, recommends it, and like citations without number can be multiplied. Says the President of the Prison Association of New York: "The terrors of punishment probably do not exert any very deterrent influence on hardened offenders. But I conceive that this proposed punishment would have a stronger deterrent and restraining power than any punishment now provided by our penal codes. This, indeed, constitutes to my mind a most cogent argument in support of the measure."

Opponents of such sterilization may urge, on constitutional grounds, that it is "a cruel and unusual punishment," to which its advocates reply that the objection that it is unusual applies to every possible change that may be proposed in the treatment of criminals, that everything that is new is unusual, electrocution itself being an unusual punishment when it was first applied; that to be obnoxious to the Constitution, it must be both cruel and unusual. To them, therefore, the objection that sterilization is unusual is of no weight. The claim that it is cruel may, they admit, deserve consideration, although they produce a mass of testimony of physicians "skilled in the art" which certainly seems to annihilate this objection. The real objection, if there be any, they insist, is based on sentiment wholly, not on reason; yet sentiment has to be reckoned with as well as logic in dealing with affairs. Of course, no criminal law or penal measure ought to be adopted unless it is approved and supported by prevailing public opinion, otherwise it would prove ineffective. We have too much "dead timber" on our statute books already!

Will public opinion justify the use of this remedy in the case of desperate and incorrigible criminals? It is difficult to ascertain the state of public opinion upon such a question. For some inscrutable reason the question is deemed a delicate one for public discussion, though the details of salacious divorce cases occupy full columns! The State of New York does prohibit the association of the sexes during their limited period of imprisonment and segregation, and even characterizes any sexual relations with a female prisoner as rape in the first degree, punishable by a further imprisonment not exceeding twenty years. Thus, in a measure, the State does forbid to those convicted of crime the right to propagate their kind. Shall this prohibition be made more permanent

and effective? What lawyers call "an unbroken line of authorities" says that it should be. While scientists have studied this subject, fraught as it is with appalling public importance, popular ignorance touching it is amazing. It certainly deserves the most careful consideration of all who are interested in the diminution of crime and the uplifting and betterment of the human race.

A persistent lawyer who had been trying to establish a witness's suspicious connection with an offending railroad was at last elated by the witness's admission that he "had worked on the railroad."

"Ah!" said the attorney, with a satisfied smile. "You say you have worked on the P. T. & X?"

"Yes."

"For how long a period?"

"Off and on for seven years, or since I have lived at Peacedale on their line."

"Ah! You say you were in the employ of the P. T. & X. for seven years, off and on?"

"No. I did not say that I was employed by the P. T. & X. I said that I had worked on the road, off and on, for that length of time."

"Do you wish to convey the impression that you have worked for the P. T. & X. for seven years without reward?" asked the attorney.

"Absolutely without reward," the witness answered, calmly. "For seven years, off and on, I've tried to open the windows in the P. T. & X. cars, and never once have I succeeded."
—*Youth's Companion*.

Perhaps the Sugar Trust hopes justice will use a pair of the old custom-house scales.—*Washington Post*.

Alaska is being touted as the dairying country of the future. Ice cream!—*Cleveland Leader*.

West Virginia Court of Appeals

Decisions Handed Down at the Last Term

Reported Especially for the Bar

Appearing Here for the First Time in Print

BARBEE v. HOWARD, MAYOR, ET ALS.

Mason County. Dismissed.
Williams, Judge.

SYLLABUS.

A writ of error involving title to an office will be dismissed without decision, and without costs, when it appears that, pending the appeal, the term of office has ended, unless it appears that there is some substantial emolument belonging to the office which the *de jure* officer would be prevented from recovering from the *de facto* officer without a reversal of the judgment of the lower court.

day.

SMITH v. ROOT ET ALS.

Roane County. Affirmed.
Williams, Judge.

SYLLABUS.

1. Equity has jurisdiction of a suit brought by the senior lessee in an oil lease against his lessor and a junior lessee of the

same land from the same lessor, for the purpose of enjoining the removal of the oil from the leased premises and for specific execution of his lease; and, in such a suit, the court can settle the conflicting claims of the lessees, and grant such relief to either claimant as the pleadings and proof may warrant.

2. An oil and gas lease giving the lessee the right, for the period of ten years, to explore for oil and gas, and providing that if a well is not completed on the leased premises within three months from the date of the lease the lessee shall pay to the lessor, in advance, a quarterly cash rental for each additional three months the completion of a well is delayed, is an executory contract and vests no title in the lessee to the oil and gas in place.

3. Such a contract contemplates development of the leased premises within a reasonable time, and the lessee may lose his rights thereunder before the expiration of the ten years by abandonment of the lease, notwithstanding there is no forfeiture clause in the contract.

4. If the lessee has not actually entered upon the land, the relinquishment of his right to do so, or his abandonment becomes purely a question of his intention, and may be established by proof of such facts and circumstances as evince a voluntary waiver of his rights.

5. A case in which the evidence proves a voluntary abandonment of the lease by the lessee.

PENNINGTON v. GILLASPIE.

Tucker County. Reversed, and New Trial Awarded
Miller, Judge.

SYLLABUS.

1. Though under the civil damage act, section 26, chapter 32, Code 1906, as construed by this court, no damages can be given a widow against a licensed retailer of spirituous liquors, because of injury to her means of support by the death of her husband, caused by intoxicants sold her husband by him, the refusal of the court on defendant's motion to strike out of her declaration certain references to the death of her husband, will not on writ of error to this court be treated as error when it appears, as in this case, that defendant was

not prejudiced thereby, and that, in ruling on said motion the court announced that the questions presented thereby could and would be acted upon by the court on the trial of the case, and it further appears that on the trial the rights of the defendant were not prejudiced by the judgment of the court on his motion.

2. Where upon demurrer to a declaration, and to each count thereof, the demurrer is overruled, and it appears that one or more of the counts are bad, and that the demurrer should have been sustained thereto; yet, when it clearly appears that no evidence was admitted, or relief given on the defective count, and that the rights of defendant were not prejudiced by the erroneous ruling of the court the judgment will not be reversed solely on this ground.

3. A defendant by introducing his own evidence after his motion to exclude the plaintiff's evidence has been overruled thereby waives his motion to exclude.

4. In such an action by a widow against a licensed retail liquor dealer for injury to her means of support, due to illegal sales of intoxicants to her husband resulting in his death, she is limited in her recovery to damages accruing to her within one year prior to the date of her suit and up to the date of the death of her husband, and an instruction to the jury on this subject should so limit them in their verdict.

5. In such an action by a widow against such retail liquor dealer, proof of the illegality of the sales of intoxicants by him to her husband supplies all the elements necessary in other actions of tort to show fraud, malice, oppression or wanton, wilful, or reckless conduct, or criminal indifference to civil obligation on the part of the defendant, justifying the jury in awarding exemplary damages against him, as provided by statute.

6. In such an action if the plaintiff be entitled to actual damages, the jury may be told in an instruction that they may also award exemplary damages; but it is error to tell them that they should award exemplary damages.

7. It is a general rule, with few, if any exceptions, that a matter decided on appeal becomes, in effect, *res judicata* in that case; or, as it is frequently expressed, it becomes the law of that case in all subsequent proceedings; but when on a second appeal or writ of error it appears that the position of the parties has not been changed, or their rights injuriously affected by an erroneous ruling of the appellate court on the first hearing, and that no injustice or hardship would result from overruling the former decision, and it becomes necessary to reverse the case for other errors, the appellate court may correct

its ruling on the former appeal or writ of error, and direct the lower court on a new trial to disregard the first ruling.

8. In an action by a widow under said civil damage act, to recover from the defendant damages for injury to her person, and to her means of support, resulting from illegal sales of intoxicants to her husband, if there is no evidence of any injury to her person, it is error to submit to the jury in instructions given the question of damages to her person.

9. It is not reversible error for a trial court, having given one instruction thereon, to refuse to reiterate the same proposition by other instructions to the jury.

10. In an action under said civil damage act it is not error to refuse to instruct the jury that if they believe from the evidence that the plaintiff's means of support derived from her husband for the year preceding the date of his death was as much and as adequate as it had theretofore been, they should find for the defendant. The wife is entitled in each year to the best support, consistent with her station in life, that the husband in that year is capable of providing, and she should not be limited in her recovery by any such comparison.

11. And it is error in such an action to instruct the jury that if they should find that the plaintiff's husband had at all times retained within the year prior to his death sufficient money and property to properly support her according to her station in life she could not recover.

12. In such an action against him a liquor dealer is responsible for actionable injuries caused by sales of liquor made by his agents or servants within the general scope of their employment, though the particular sale in question was made without his knowledge or consent, or even in disobedience to his general or specific orders.

13. It is not error for the court in an instruction to the jury on the subject of the weight and preponderance of the evidence necessary to support the plaintiff's case to refuse to tell the jury "that they may arrive at this conclusion *not* from the number of witnesses who may have testified on either side of the case, but from the demeanor, character, reputation or credibility of the witnesses." Such an instruction unless some such word as "alone," or "merely" be inserted after the word "not," is calculated to mislead the jury and induce the belief that they have no right to consider the fact of the number of witnesses.

14. It is error in the trial of such an action for the court, in the exercise of its discretion, to refuse to submit to the jury on the motion of the defendant a special interrogatory as to how much they had included in their verdict for actual damages, or in the alternative,

how much was included therein for exemplary damages. It being one of the primary issues in the case, the plaintiff is entitled to know how much was found for actual damages, and thereby to ascertain the amount awarded for exemplary damages, and to be enabled thereby to test the correctness of the verdict on a motion for a new trial.

MITCHELL ET AL. v. PENNY.

Hancock County. Affirmed.
Poffenbarger, Judge.

SYLLABUS.

1. On the termination of a guardianship, without a settlement of the guardian's accounts, and ascertainment of the amount due from him, in some appropriate manner, an action of assumpsit cannot be invoked by the ward to enforce settlement of the accounts and payment of the amount remaining in the guardian's hands.

2. For the purpose of settlement, the guardianship is deemed to continue after it has, in law, ceased.

ROBINSON v. LOWE.

Wetzel County. Judgment Affirmed.
Brannon, Judge.

SYLLABUS.

Point 6 in *Wilson v. Braden*, 48 W. Va. 196, as to possession of interlock, re-affirmed.

WYATT, ADM'R. v. NORRIS.

Cabell County. Affirmed.
Robinson, President.

SYLLABUS.

1. The words of a will must receive their usual and popular ordinary signification, unless there is something in the context or the

subject matter plainly indicating a different use of the terms employed.

2. A bequest of a grocery store and its business, together with all accounts, claims and debts due and owing to the testator and growing out of the business, does not embrace deposits in bank, where there is nothing in the will clearly indicating that the words are used in a sense different from their ordinary acceptation.

NATIONAL VALLEY BANK OF STAUNTON v. HOUSTON, ET AL.

Monroe County. Affirmed.
Miller, President.

SYLLABUS.

1. A declaration in assumpsit on a promise in writing to pay money, which distinctly alleges fulfillment of the only condition on which such payment was made to depend, is good on demurrer.

2. Though an exception of defendant to a ruling on a special plea tendered be not contained in any order entered in the court below, yet if it be shown in the certificate of evidence, or in any other part of the record, the defendant may avail himself here of any error in rejecting such plea.

3. A special plea alleging want of complete delivery of the bond sued on, and that condition of the delivery thereof had never been complied with, and concluding with an "*et sic non est factum*," is substantially a plea of *non est factum*, and if not verified as required by section 3859, Code 1906, is properly rejected.

4. A plea which is substantially a plea of failure of consideration, or fraud in the procurement of the contract sued on, by section 3891, Code 1906, requires verification, without which it is properly rejected.

5. A general replication to such a special plea is all that is required to put in issue all the material matters of defense therein pleaded, and a special reply is not required.

6. In a suit involving the question of financial responsibility of some of the defendants, at the time they signed the contract sued on, the property books of the county are proper evidence, not of perfect title to the property, but as tending to show claim of right and title by such defendants to the property charged to them for taxation, and as pertinent to the issue.

7. Error in sustaining objections to questions propounded a witness will not be available here unless the record affirmatively shows that the complaining party has been prejudiced thereby.

8. A contract under seal to pay to another as committee, a certain sum of money, the proceeds thereof were to be so expended so far as might be necessary in making a location survey for a railroad, and in paying other necessary expenses attending the same, is not void for want of mutuality.

9. Though such contract be treated as a mere subscription to the object specified, if the subscription be acceded to, on the terms on which it is made, and labor or money be expended on the faith thereof, the party making the subscription is bound thereby.

10. Indorsements made by the clerk on the back of a bill of exceptions or certificate of evidence will not be sufficient to impeach the verity of the certificate of the judge to such bill of exceptions, or the vacation order of the judge certifying such bill of exception to the clerk.

BARTLETT & STANCLIFF v. BOYLES.

Pleasants County. Reversed in Part. Affirmed in Part.
Miller, President.

SYLLABUS.

1. Exceptions to a commissioner's report, which are too general and do not point out the specific items excepted to, or refer the court to the evidence relied on in support thereof will not be considered on appeal to this court.

2. The members of a mining partnership not agreeing, those having the majority interest have the right to control the management in all things necessary and proper for its operations, and are liable in and accounting only for culpable negligence, or breach of duty, or wrongful conduct, or diversion of the property from the business of the firm.

3. Though in a suit to dissolve, settle and wind up the business of a mining partnership a special receiver be prayed for, and a proper case be presented therefor, yet if neither party has owned the court to appoint a receiver, and there has been no decree appointing or refusing to appoint, no error is presented reviewable here on appeal; and no appeal lies to this court from an order or decree refusing to appoint a receiver.

4. Where in a suit for that purpose a dissolution, accounting and winding up of a mining partnership has been decreed, it is error on a partial settlement for the court to give a personal decree against one partner in favor of another for a balance found due him on such partial settlement. The social property should be first reduced to money and applied to discharge partnership liabilities, including any balance found due on final settlement from one partner to another, and then a decree over on final settlement for any balance that may remain.

5. Where one member of a mining partnership has advanced money or property to pay the share of another in the operating expenses he is entitled to interest thereon, as against the delinquent partner, on dissolution and final settlement and winding up of the partnership.

LISKEY, ET ALS. v. SNYDER, ET ALS.

Randolph County. Reversed in Part. Affirmed in Part.
Miller, President.

SYLLABUS.

1. A general rule applicable as between mortgagor and mortgagee is, that if the mortgagee himself occupies the premises, especially if they consist of a farm under cultivation, upon which labor and money must be bestowed to produce annual crops, he will be charged with such sums as will be a fair rent for the premises, without regard to what he may realize as profits from the use of them.

2. The true annual rental value of land is not the value of all the farm products which can possibly be realized from its use, when the land is stocked, farmed and managed with the greatest skill and industry, but it is the price which a prudent and industrious farmer can afford to pay for its use, after taking into consideration the probable amount and the market value of his crops, and the injuries thereto resulting from the ordinary changes of climate and seasons.

3. In arriving at the true annual value of land opinion evidence evincing exaggerated and speculative notions thereof should not be allowed to overcome the evidence of actual renting of the same land and of land of like character in the same vicinity, especially when corroborated by evidence showing the amount, char-

acter, condition and location of the land.

4. A mortgagee in possession has the right to protect the property, and to be reimbursed his expenses in so doing.

5. Where reasonable repairs and permanent improvements have been made in good faith, by one standing upon the legal footing of a mortgagee in possession, but who supposes himself to have acquired the absolute title, the value of them will be allowed upon the subsequent redemption of the land.

6. Where payments are made from time to time on a debt bearing interest, the interest should be computed on the debt up to the time of payment, and the payment deducted from the aggregate of principal and interest and the balance form a new capital, but which must not be more than the former. If the payment be less than the interest due at the time the surplus of interest must not go to augment the capital; and it is error for a commissioner in stating an account to allow interest on payments to a future day when the debt is paid or settlement made, and then deduct the payment and interest from the debt, principal and interest.

7. Where a decree is rendered for payment of money it should, as required by Section 3988, Code 1906, be for the aggregate of principal and interest due at the date of the decree, with interest from that date; and it is error to give interest upon the aggregate of principal and interest anterior to the date of the decrees.

STATE v. CRAWFORD.

Kanawha County. Affirmed.
Miller, President.

SYLLABUS.

1. Where necessary to correct errors, defects or omissions in the original transcript or return filed in an appellate court, an additional or supplemental transcript or return may be obtained on proper application, and when filed in the appellate court will be considered as part of the original transcript or return, and a writ of certiorari is proper for that purpose.

2. On a trial for murder instructions to the jury asserting defendants right to stand his ground and not retreat, based on the theory of a deadly attack by deceased on, and on defendant in,

his dwelling or castle, are inapplicable where the evidence shows defendant and deceased were at the time of the homicide jointly occupying the house where the killing occurred, the ordinary rules as to self defense, propounded in other instructions given at the request of defendant, alone being applicable.—Miller, President, dissenting.

3. On the trial of one indicted for murder the evidence may be such as to justify an instruction on the theory of manslaughter, and also on the theory of self defense. These defenses are not necessarily inconsistent.

4. Words alone, however insulting or contemptuous, are never sufficient to reduce murder to manslaughter, at least where a deadly weapon is used; but when accompanied by the acts of the deceased showing a purpose to commit personal violence on the accused as by raising and pointing at him a gun, as if in the act of shooting, the accused is entitled to an instruction based on the theory of manslaughter.

5. An instruction on the theory that the killing, though intentional, was done in the heat of blood, or violent passion, and on adequate and sufficient provocation, reducing the offense from murder to manslaughter, is not bad because it omits the words "without malice," for "heat of passion" necessarily includes "without previous malice."

6. A proposed instruction to the jury telling them that where one kills another, though intentionally, but in passion, in the heat of blood, upon sudden provocation, by gross indignity, or by threat of personal violence, was rightly rejected. By the use of the disjunctive "or," the instruction would have justified the murder if only the deceased threatened the defendant with personal violence.

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Published Monthly from October to May.

Bi-monthly from June to September.

Entered as second class matter August
11, 1904, Postoffice, Morgantown,
W. Va., under the Act of
Congress March 3rd, 1879.

Price, per Copy.....\$.10
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The bar of the State has had a very full expression from the judges on the true functions of that office; now we would ask the members of the bar which they prefer: to have the law administered as it is, or as the court thinks it ought to be.

John Chinaman has been expressing his opinion about law in this country. He says there's too much law and not enough justice. "In China," he says, "man kill man, tried, head come off;" in England man kill man, tried, maybe head come off; in America, man kill man, tried, too dam much Supreme Court." We believe Judge McWhorter acquiesces in this comment.

In the New York Shirt-waist strike three girls were arraigned charged with having called 'scab' at the strike breakers, which it seems tends to a breach of the peace. Each girl admitted using the term, but their lawyer, who evidently had not appeared for the defense in a strike case before, began ranting as to the meaning of the word 'scab.' Magistrate O'Connor listened patiently, apparently amused at the counselor's extravagant eloquence. Now, your Honor, yoost vat is der meaning of der word "scab"?' concluded the lawyer. 'Well,' said the Court, winking at the bridge policeman, to call "scab" at a strike breaker is the same as calling "shyster" at a lawyer. I fine the girls \$1 each.'

Chief Justice Best, in *Fletcher v. Lord Soudes*, 3 Bing., 580, says: "If this rule is violated, the fate of the accused person is decided by the arbitrary discretion of judges and not by the express authority of the laws." * * * "The courts have no power to create offenses but if by a latitudinarian construction they construe cases not provided for to be within legislative enactment, it is manifest that the safety and liberty of the citizen are put in peril, and that the legislative domain has been invaded. * * * The doctrine is funda-

mental in English and American law that there can be no constructive offenses; that before a man can be punished, his case must be plainly and unmistakably within the statute; that if there be any fair doubt whether the statute embraces it, that doubt is to be resolved in favor of the accused. These principles admit of no dispute, and often have been declared by the highest courts, and by no tribunal more clearly than the supreme court of the United States."

Blackstone says:

"Under moderate governments, the law is prudent in all its parts, and perfectly well known, so that even the pettiest magistrates are capable of following it. But in a despotic state, when the prince's will is the law; though the prince were wise, yet how could the magistrate follow a will he does not know? He must certainly follow his own. [p. 79.] In despotic governments there are no laws, the judge himself is his own rule. [p. 92.]"

"Miserable is the condition of individuals, dangerous is the condition of the state, if there is no certain law, (or which is the same thing) no certain administration of law, to protect individuals or to guard the state. * * * Under such an administration of the law no man could tell, no counsel could advise, whether a paper were or were not punishable. I am glad that I am not bound to subscribe to such an absurdity, such a solecism in politics."

King v. Dean of St. Asaph, 3 Terms Rep. 431. (1784)

"It has been wisely and aptly said that this is a government of laws and not of men; that there is no arbitrary power located in any individual or body of individuals; but that all in authority are guided and limited by those provisions which the people have, through the organic law, declared shall be the measure and scope of all control exercised over them."

68 Ate. Rep. 490.

"All must have the equal protection of the law and its instrumentalities. The same rule must exist for all in the same circumstances," (which cannot be the same if the criterion of guilt is uncertain, as it must be where left for judicial creation.)

Chic. St. L. & R. v. Moss, 60 Miss., 641-647.

"The discretion of a Judge is the law of tyrants; it is always unknown; it is different in different men; it is casual and depends upon constitution and passion. In the best it is often, at times capricious; in the worst, it is every vice, folly and madness to which human nature is liable." The above was quoted from Lord Camden, who also observed; "the most odious and dangerous of all laws would be those depending on the discretion of Judges." 43 Ala. 310.

"When we consider the nature and theory of our government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely arbitrary power," (such as must result if the statute leaves the test of criminality uncertain).

Yick Wo. v. Hopkins, 118 U. S. 356-359.

"It is obvious there can be no certain remedy in the laws where the legislature may prescribe one rule for one suitor or a class of suitors in the courts, and another for all others under like circumstances, or may discriminate between parties to the same suit."

Durkee v. Janesville, 28 Wise., 464 (471).

"It is urged that this is a harsh construction. To this we reply that, if it be the true construction, its harshness is no concern of the courts. They have no responsibility for the justice or wisdom of legislation, and no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional power of the law-making body. It is said that

the liability under the statute, as thus construed, imposes so great a hardship upon the railroads that it ought not to be supposed that Congress intended it. Certainly the statute ought not to be given an absurd or utterly unreasonable interpretation, leading to hardship and injustice, if any other interpretation is reasonably possible. But this argument is a dangerous one, and never should be heeded where the hardship would be occasional and exceptional. It would be better, it was once said by Lord Eldon, to look hardship in the face rather than break down the rules of law."

210 U. S. 295.

Chief Justice Marshall said:

"Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are mere instruments of the law and can will nothing. When they are said to exercise a discretion it is a mere legal discretion—a discretion to be exercised in discerning the course prescribed by law; and when that is discerned it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature, or, in other words, to the will of the law."

Was there ever a more disgraceful exhibition of anarchy under the forms or fictions of a government of law and order, than is seen in Philadelphia? There is probably no other government on earth that would tolerate such an exhibition as that if it could suppress it. The government of Pennsylvania would better take down its sign.

WILL THE JUDICIAL HISTORY OF ANCIENT GOVERNMENT REPEAT ITSELF IN THE AMERICAN REPUBLIC?

There are two or three things we have recently sought to emphasize in these pages that we are inclined to once more restate:

The first is the historic fact that in the experience of all governments and all nations in all time, that function of government, or that tribunal which has been dominant in the constitution of a government, has always gradually extended its jurisdiction farther and farther until, if not intercepted, it has absorbed the whole power of that government. In almost every experiment of ancient governments, somebody or some institution has sought to become supreme. Seldom has it been possible for a part of the government which had no superior to voluntarily limit its own functions.

The second historic fact is that the judicial function of government has in the past, seemingly offered stronger temptations to the passion for power and has furnished, perhaps, more frequent examples of usurpations of power and the arbitrary exercise of power than any other function of government—logically and inevitably so, for the reason that it is usually and necessarily the only part of a governmental framework that can determine the extent of its own jurisdiction.

The third fact is that we are not so far removed in point of time, from illustrations of the thralldom and tyranny of judicial usurpation in government, that we can boast that we are immune, or that there is anything in our system that makes an impassable barrier, or even feel assured that the signs of the times do not indicate that history might repeat itself.

We do not write as an alarmist, or from lack of a profound faith in our judges, or faith in our system of government, but rather upon the tendency of the times and their possibilities.

Edward Livingston, a U. S. Senator, Secretary of State under Pres. Jackson, and Minister to France, reputed to be one of the greatest American lawyers of his day, in a report made to the General Assembly of the State of Louisiana in 1822, on the plan of a Penal Code, said some things that are as appropo now, if not more so, than when uttered. After reciting the history of judicial usurpations in the past he said:

"This dreadful list of Judicial cruelties was increased by legislation of the judges who declared acts which were not criminal under the letters of the law, to be punishable by reason of its spirit. The statute gave the text and the tribunals wrote the commentary in letters of blood, and extended its penalties by the creation of constructive offenses. The vague, and sometimes unintelligible language, employed in the penal statutes, gave a color of necessity to this assumption of power, and the English nation have submitted to the legislation of its courts, and seen their fellow subjects hanged for constructive felonies, quartered for constructive treason, and roasted alive for constructive heresies, with a patience that would be astonishing, even if their written laws had sanctioned the butchery. The first constructive extension of a penal statute beyond its letter, is an *ex post facto* law, as regards the offense to which it is applied, and is an illegal assumption of legislative power, so far as it establishes a rule for further decisions. In our republic where the different departments of government are constitutionally forbidden to interfere with each other's functions, the exercise of this power would be particularly dangerous. * * * It may be proper to observe that the fear of these consequences is not ideal, and that the decisions of all tribunals under the common law, justify the belief that without some legislative restraint our courts would not be more scrupulous than those of other countries, in sanctioning this dangerous abuse. [p. 17-18]. It is better that acts of an evil tendency, should for a time be done with impunity than that courts should assume legislative pow-

ers, which assumption is itself an act more injurious than any it may purport to repress. [p. 118.]

The fourth matter in this connection is, that while under our system of government the three departments are made more distinct and independent than in past experiments, there is no ground for the assumption that the limitations upon our courts are any better defined or more pronounced than in other systems. It is true that we have a written constitution which prescribes their jurisdiction, but only in general terms, and the courts construe the constitution. They also construe the powers and duties of all the other departments. The U. S. Supreme Court has already virtually said that its jurisdiction under the constitution is independent of any legislation of the Congress. The courts can by process of construction nullify any act of legislation. They can restrain and compel the hand of the Executive. And if there is any further power essential to their complete domination, they have it within themselves to determine the limitations of "judicial discretion" that are necessary for their purpose.

Why then should not the history of judicial usurpation and tyranny repeat itself under our system? We are dealing with possibilities not probabilities. If the possibilities exist the probabilities will bear watching.

In his last years, Thomas Jefferson, looking over his life work, as one of the chief architects of our government, made this suggestive comment:

"It has long been my opinion, and I have never shrunk from its expression (although I do not choose to put it into a newspaper, nor, like a priam in armor, offer myself its champion,) that the germ of dissolution of our Federal government is in the constitution of the Federal Judiciary; an irresponsible body (for impeachment is scarcely a scarecrow) working like gravity by night and by day, gaining a little to-day and a little tomorrow and advancing its noiseless step like a thief over the field of jurisdiction, until all shall be usurped from

the States, and the government of all be consolidated into one."

With what a prophetic eye did this statesman look down the path of our government's history and note the logical and inevitable results of its operation, as well as the peculiar process by which the result he predicted would be, if it ever is, worked out: "Working like gravity, by night and by day, gaining a little to-day and a little tomorrow and advancing its noiseless step like a thief over the field of jurisdiction, until all shall be usurped."

Do the signs of the Times to-day, portend that the soil is being turned and the seed sown for working out this prophecy? What about the ideals of "Judicial Discretion" that are maintained and uncouraged to-day in high places; the bold and defiant encroachments of the Bench upon the functions of the legislative department; and the loose and indifferent attitude of some judges toward the letter of the law.

By these signs will the courts conquer, and have conquered in the past; Not only Jefferson, but a long line of statesmen, from his day, down to the present, have been sounding the same alarm, as to these insidious encroachments:

Listen: Montesquieu said:

"In all of the English charters of liberty, and their various re-affirmations, one principle is always discernable in the use of such words as "due process of law," and by the "law of the land." It was not the purpose to change the person of the despot, or to transfer despotic power from an autocrat to the judiciary; neither was it intended merely to influence, those vested with despotic power to change the mode of exercising their discretion under it. On the contrary, the plain purpose was to destroy the discretion itself, so as, at the trial of an accused, to preclude every possibility of the arbitrary judicial determination as to what should be the criminal statutes as applied to his acts. All along the history of these stormy times, it is made plain that the charter phrases, for

the protection of liberty were designed to mean that a man should not be deprived of liberty or property except by a prior duly enacted publicly promulgated law, which to be a "law" must be general in terms equal in its application to all who in the nature of things are similarly situated."

Alexander Hamilton in discussing this subject, among other things, wrote: "I agree [with Montesquieu] that there is no liberty if the power of judging be not separated from the legislative and executive powers. [p. 484.] To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them; * * * The creation of crimes after the commission of the fact, or, in other words, the subjecting of men to punishment for things which when they were done, were breaches of no law [or could not have been ascertained to be such because of the uncertainty of the statute]; and the practice of arbitrary imprisonment have been in all ages the favorite and most formidable instruments of tyranny. [p. 490.]

Sidney says, 'Liberty consists solely in an independency on [of] the will of another, and, by a slave, we understand a man who can neither dispose of his person or goods, but enjoys all at the will of his master.' And again, "As liberty consists only in being subject to no man's will and nothing denotes a slave, but a dependence upon the will of another; if there be no other law in a kingdom but the will of a prince, [or of the judiciary] there is no such thing as liberty!"

Coke said:

"It is the function of a judge, not to make, but to declare the law according to the golden metewand of the law, and not by the crooked cord of discretion."

KUHN vs. FAIRMONT COAL COMPANY.

The Supreme Court of the United States on January 3, 1910, rendered a decision in *Kuhn v. Fairmont Coal Company* which is of much interest and importance as formulating the attitude of Federal courts toward the decisions of State courts. The able and lucid opinion of a unanimous court was written by Mr. Justice Harlan. It is printed in full in the *Chicago Legal News* for January 15, 1910, (vol. 42, p. 181). The case has an especial significance because occasion is taken to explain and limit certain broad statements in former utterances of the same tribunal. The following principles are laid down:

"We take it, then, that it is no longer to be questioned that the Federal courts in determining cases before them are to be guided by the following rules: 1. When administering State laws and determining rights accruing under those laws the jurisdiction of the Federal court is an independent one, not subordinate to but co-ordinate and concurrent with the jurisdiction of the State courts. 2. Where, **before the rights of the parties accrued**, certain rules relating to real estate have been so established by State decisions as to become rules of property and action in the State, those rules are accepted by the Federal court as authoritative declarations of the law of the State. 3. **But where the law of the State has not been thus settled**, it is not only the right but the duty of the Federal court to exercise its own judgment as it also always does when the case before it depends upon the doctrine of commercial law and general jurisprudence. 4. So, when contracts and transactions are entered into and rights have accrued under a particular state of the local decisions, or when there has been no decision by the State court on the particular question involved, then the Federal courts properly claim the right to give effect to their own judgment as to what is the law of the State applicable to the case, even where a different view has been expressed by the State court

after the rights of parties accrued. But even in such cases, for the sake of comity and to avoid confusion, the Federal court should always lean to an agreement with the State court if the question is balanced with doubt."

In the Kuhn case the Supreme Court asserts the propriety of the pronouncement of State law by a Federal court, because there had been no State decision on the question involved when the rights of the parties accrued. It appeared that the plaintiff, a citizen of Ohio, had conveyed all the coal underlying a certain tract of land in West Virginia, of which he was the owner in fee, "together with the right to enter upon and under said land and to mine, excavate and remove all of said coal, and to remove upon and under the said lands the coal from and under adjacent, coterminous and neighboring lands, and also the right to enter upon and under the tract of land hereinbefore described and make all the necessary structures, roads, ways, excavations, air-shafts, drains, drain-ways and openings necessary or convenient for the mining and removal of said coal and the coal from coterminous and neighboring lands to market."

The declaration alleged that the coal so conveyed having passed to the defendant, a West Virginia corporation, it was so mined by the latter without leaving blocks or pillars or other means of support, that "the plaintiff's surface land, or a large portion thereof, was caused to fall, and that it was cracked, broken and rent, causing large holes and fissures to appear upon the surface and destroying the water and water courses." The action was trespass on the case to recover for the damages so caused to the surface land. It appeared that after the beginning of the present action, in a suit similar in all substantial respects brought by one Griffin against the same defendant, the Supreme Court of West Virginia held, among other things:

"The vendor of land may sell and convey his coal and grant to the vendee the right to enter upon and under said land and to mine, excavate and remove all of the coal pur-

chased and paid for by him, and if the removal of the coal necessarily causes the surface to subside or break, the grantor cannot be heard to complain thereof. Where a deed conveys the coal under a tract of land, together with the right to enter upon and under said land, and to mine, excavate and remove all of it, there is no implied reservation in such an instrument that the grantee must leave enough coal to support the surface in its original position." (Syllabus by the court.)

The United States Circuit Court of Appeals thereupon certified to the Supreme Court of the United States the following question to be answered:

"Is this court bound by the decision of the Supreme Court in the case of *Griffin v. Fairmont Coal Company*, that being an action by the plaintiff against the defendant for damages for a tort, and this being an action for damages for a tort based on facts and circumstances almost identical, the language of the deeds with reference to the granting clause being in fact identical, that case having been decided **after** the contract upon which defendant relies was executed, **after** the injury complained of was sustained and **after** this action was instituted?"

Without expressing any opinion as to the rights of the parties under their contract, the Supreme Court of the United States, under the principles above laid down by it answers the question of the Circuit Court of Appeals in the negative.

West Virginia has come out of the U. S. Supreme Court with its territory intact from the contest with Maryland, which state sought to take a slice of our real estate. We would fain hope that we may be equally fortunate in our tilt with Virginia who is trying to get her hand in our treasury.

COAL AND COKE RAILWAY COMPANY CASE.

It is generally known among the members of the profession that the Coal and Coke Railway Company has instituted a suit in equity to enjoin the enforcement of the statute making the maximum rate for the transportation of passengers by rail in this state two cents per mile on all railroads within this state fifty miles and over in length. This suit was instituted in the circuit court of Kanawha county, to which the Attorney General and the Prosecuting Attorney of Kanawha county were made the defendants. The case was decided by the circuit court in favor of the Plaintiff, and from the decree enjoining the execution of this law an appeal has been taken to the Supreme Court of Appeals, which has already been argued and submitted for decision.

We are in receipt of a copy of the argument made by our Attorney General, which we have read with a great deal of interest. It is a very clear and able presentation of the state's contentions that the law is constitutional on its face and that its operation does not deprive the railway company of its property without due process of law and therefore is not confiscatory of its property. It seems to us that the argument made by the Attorney General to show that equity does not have jurisdiction of this case is supported by reason and authority. The adjudications disclosing an adequate remedy at law, without resort to a court of equity to restrain the enforcement of legislation imposing a penalty for its violation, are pertinent and quite decisive, as shown by the Attorney General in his brief.

A very strong feature of his brief is that part of it devoted to the argument of the constitutionality of the two-cent rate act on its face. It was decided in the court below that the act is unconstitutional on its face, because it does not afford to all railway companies operating in the State the equal protection of the law, and that therefore it is in violation of the Fourteenth Amendment of the Constitution of the United

States, which declares that "no state shall deny to any person within its jurisdiction the equal protection of the laws." In support of the proposition that the law does not violate this amendment, many decisions of the Supreme Court of the United States and of the state courts are referred to. The argument on the validity of this act is very cogent, and presents the state's side of the case in a clear and very lawyer-like manner.

In arguing the question whether or not the act is confiscatory as to plaintiff's railway, the Attorney General has gone into detail with reference to the evidence adduced by the plaintiff, has made a rigid analysis of it, and has quite conclusively shown in our judgment that the plaintiff has signally failed to establish that part of its bill charging that the operation of the law deprives it of its property without due process of law.

The argument covers all phases of the bill, states all the propositions embodied in the case with great clearness and succinctness, evinces a careful study of the questions involved, and presents an argument in keeping with the dignity of the office from which it emanates and characterized by that spirit of fairness which is always expected of the unbiased officer of the law.

Although at this writing the decision of the court has not been announced, we anticipate that it will be before this issue of *The Bar* goes to press.

After 13,000 miles of dinners, it is not strange that President Taft comes out in favor of a national board of health.—*New York Evening Post*.

COMPETITION VS. THE COMBINE.

Here is a pretty picture of old time methods of business that reads like a novel, in this day.

It is an illustration of business conducted under the stimulus of nature's regulator of trade, competition, which in the present time has been entirely eliminated and superceded by the "Combine." And with the elimination of competition has gone also the benefits and triumphs of superior enterprise and honest acumen, as well as the benefits of a fair price to the consumer.

This picture suggests the only solution of the grave problem with which our statesmen are now struggling, by way of restoring normal relations between the producer and the consumer.

In the town of Windsor in Vermont, there are two general stores doing business side by side. The people from the country for miles around drive in to Windsor and make their purchases from one or the other of the two establishments. This is not only competition in its simplest form but also of the most desirable kind.

The pedigree of the rival stores is the same. The present concern was a partnership known as Tuxbury & Stone, dating from 1866. About fifteen years ago in the ordinary development of the rural trade of which Windsor is the market place, Tuxbury & Stone dissolved, or rather resolved itself into the two firms, of Stone, Tracy & Co., and Dwight Tuxbury & Sons. The former continued business at the original stand, on the main street of Windsor, at the corner of the lane leading to the railroad station. The latter built and occupied a new store next door. In this juxtaposition the two establishments have carried on an active competition in the same line of general retail mercantile business and have divided pretty nearly equally the trade of Windsor and an area of about twenty square miles of country tributary to the town. From cranberries and eggs to wheelbarrows and

agricultural implements, each watches the business of the other with acute interest and intelligence, and each strives constantly for every legitimate advantage over its neighbor and rival.

The story does not say that each of these rival stores prospered more than if they had operated under a modern "combine," but we are sure they did, and their customers were better satisfied.

A NEW WORK ON REAL PROPERTY.

We are in receipt from the publishers, The West Publishing Co., of a copy of the New Work on Real Property by Minor & Wurts, of the Va. University Law Faculty.

This is another attempt to modernize the statement of the laws of real property. It is written for the law students and as the publishers announce:

"The purpose of this book is to state the Common Law of Real Property, showing wherein it has been repealed in this country as contrary to the fundamental laws and the spirit of our institutions, and to set out such statutory changes as are common to all states. All teachers of Real Property appreciate the difficulties of the student's mind in dealing with this most difficult branch of the law, and in reading Prof. Minor's and Prof. Wurts' new book, one's attention is quickly drawn to the clever way in which many of these difficulties are smoothed out and made clear. The authors' complete grasp of the subject, their thoroughness of analysis, their powers of demonstration, and the care with which they have avoided ambiguous statements make the book the cleanest-cut exposition of the Common Law of Real Property that has been produced in this country."

We believe there is a general demand for just such a work as this, and that it will be welcomed not only by the student but by the Profession at large.

JUDGE DOOLITTLE'S REPLY.

We were greatly interested and entertained by Judge Doolittle's paper, which appears on another page of this journal.

But it comes to us too late for comment in this number. We were obliged to set aside other matter already in the hands of the printer to give it space, as we thought Judge Doolittle was entitled to a prompt reply to our "insinuations"; but we can't set aside other matter for comment.

We will only say now, that it is our judgment that Judge Doolittle is a Judge whose quality of mercy is not strained, even if his law is.

He's a free lance.

A COMMON CRITICISM.

It has been charged again and again that the rich and influential never go to jail in this country; that the net of justice is ingeniously woven so as to permit the big criminals, who make money out of lawbreaking, to slip through, while the insignificant offenders, who are often creatures of men of stronger wills, are caught and punished. There has been some basis for this charge; not in the laxity of the court or the cowardice of prosecuting officers, but in the inadequacy of our laws."—Intelligencer.

The above is a very common criticism, but is without any foundation in fact. We would much rather take our chances before the average jury as a poor man, than as a rich man. And whether before a jury or a judge, there is always the silent, secret bias of public opinion impregnating the atmosphere of a court room, and more or less prejudicing the case of the rich man. We doubt that either Morse of New York or Walsh of Chicago would have gone to the penitentiary if they had been clerks instead of presidents of banks.

JUDGE MASON'S VIEWPOINT.

We publish in this number of *The Bar* a most concise, clear cut, and clean definition of the true functions of a Judge in dealing with the law, by Hon. John W. Mason.

There is not much that could be added to this brief article, and nothing that would be taken from it, to make it a complete statement of the case. There is no quibbling or equivocation. It hits the nail on the head without any hammering on the board. And moreover it is everlastingly right.

In seeking an expression on the subject from the Judges of the State, we have had no purpose of arraigning one Judge against another, or even impugning the views or opinions of any individual Judge, but rather by way of a recurrence to fundamental principals, and really with the hope of finding that our own courts were not sharing in the obliquities that seem to be so prevalent and making such headway—or if they, were that at least we might discover the true situation.

Now, we have had what might be said to be quite a full statement of both sides of the question at issue from several standpoints. But the subject is not exhausted, and really, we are sure, that the readers of *The Bar* would like to have an expression from every Judge in the State.

Will all the Judges please understand that the space of *The Bar* is freely open to them, to take either side of the issue, or to criticise any expression that has been made.

The same invitation is made, and the same privilege is open to every member of the bar of the State.

The public might forgive the ease with which divorce is effected among millionaires, but the secrecy—never.—New York Evening Post.

A GENEROUS PEOPLE ARE BORN OF A GENEROUS GOVERNMENT.

In this country there ought not to be any enmity against the rich.

There ought not to be any desire to limit the opportunities of the individual man to accumulate a great fortune.

We surely have no cause to complain of the broad generosity of our successful men. Look at this exhibit:

Last year in this country \$147,641,253 was given in large sums to benevolent purposes. Of this sum \$70,636,387 represents gifts, and \$77,004,866 bequests. To **Charity** was given \$67,446,421; to Educational institutions, \$46,122, 241; to **Religious institutions**, \$22,443,885; to Art museums, Galleries and Public improvements, \$8,616,410; to Libraries, \$3,012,293. **John D. Rockefeller** heads the list, having given \$12,130,500; his gifts now reach the sum of \$131,760,162. **Mr. Carnegie** has given away \$162,000,000. His gifts last year amounted to \$4,652,500. The recorded gifts of large sums for the first ten years of the twentieth century are as follows:

1900	.....\$ 62,461,304
1901	..... 123,888,732
1902	..... 77,397,167
1903	..... 76,934,978
1904	..... 46,296,980
1905	..... 104,586,922
1906	..... 106,281,063
1907	..... 149,902,130
1908	..... 90,932,000
1909	..... 147,641,253

So long as our rich people distribute their wealth as they have done and are doing, it would be a public calamity if nobody had a surplus above the needs of his kith or kin. Our great benevolent institutions would shrink away. New schemes and methods for extending and enriching our civilization with the spirit of sweet charity would languish. The

public treasury would not respond to such enterprises. It is always stingy and tight-fisted to all appeals for pure benevolence. It is impossible and unthinkable that the magnificent and magnanimous schemes and movements for the uplift of our people in the present day, or even in the past year, could have drawn support from the public treasury.

Our rich men are a credit as well as a blessing to our American Republic.

NOT PERTINENT.

Judge Willis again returns to the Jacob case, but studiously avoids any reference to Pres. Roosevelt's comments on that case, or his own endorsement of Roosevelt's comments.

The latter is the only thing that has interested us in that case; and the former is the only thing apparently, that interests Judge Willis.

We have never discussed the Jacob case, and we decline to be decoyed into doing so now. We would like to gratify Judge Willis, but the case is only of local importance and would not interest readers of **The Bar**.

If we thought there was anything in it that would afford more than a hedge for Judge Willis' endorsement of Pres. Roosevelt's peculiar notions of the functions of a Judge, we would discuss it for that reason alone, but so far as we can see, it serves only as a hedge, pure and simple.

It was at a railroad junction in the South that the Northern traveler found himself hungry, but with only two minutes to spare before his train left. "I'll take a cup of coffee," he said to the young woman in charge of the restaurant. "I've no time for anything else."

"You can take all the time you want, sir," said the young woman, cordially. "You look at this bill of fare, and I'll telephone to the superintendent to delay the train a little while."

"Why, can that be done?" asked the traveler in amazement.

"Certainly," said the young woman, "Of course it can. It's a branch road, and no other train coming or going over it to-day—and the superintendent would want you to have a good meal. He owns this restaurant."—Youth's Companion.

THE FUNCTIONS OF A JUDGE

As Interpreted by Judge Mason of the 14th Circuit.

Fairmont, W. Va., Feb. 9th, 1910.

Editor of The Bar:—

I am in receipt of your letter of the 2nd inst., asking me to contribute an article for The Bar giving my views of "the true limitations of a Judge in giving effect to the law."

I have always understood that it was the duty of all persons to obey the laws of the country. I did not suppose, until the question was raised by The Bar, that it was seriously contended, by any one, that Judges were excepted, or that they were permitted to take any liberties with the law, not permitted by other people. If a Judge knows what the law is and he is called upon in his official capacity to apply it, he should do so. If he don't know what the law is, which he is required to apply, he should ascertain and then apply it. In other words when a Judge is called upon to apply law, he must consider the law as it is, and not as he would have it. It should make no difference with the Judge whether he approves the law or not. The only thing for him to consider is, what is the law? and having learned this he must follow it. No doubt every Judge has been called upon to enforce laws which he does not approve—which he would have changed if he had had the authority. But making laws or suspending them or ignoring them is no part of the business of a Judge. Court may declare what the law is, but this is quite a different thing from making the law. The duty of making laws belongs to another branch of the government.

A Judge may have his notion of what the law should be. The supreme law-making power of the state may not agree with him. It is just possible the Judge may be wrong, but whether right or wrong he must obey the law. He is wrong to start with, when he assumes a power he does not possess.

My answer then to your question as to "the true limi-

tation of a Judge in giving effect to the law" is that he should apply the law just as it is. He should neither add to its rigor in one case nor soften it in another. He has no discretion, unless the law itself gives him a discretion, and this would be no exception to the rule; for the discretion given a Judge in such laws is a part of the law.

When the people understand that courts will apply and enforce laws just as they are, they will have the laws made just as they want them enforced. While we keep within the law we are safe. Beyond this are doubts, uncertainty, confusion and danger, and worse than all, the opportunity for favoritism. Who can say that a Judge is not favoring a friend or punishing an enemy when he, at his own will, adjusts the law to suit the case? If we have any laws which are wrong they should be corrected by the law making power of the state. But why correct them if Judges refuse to follow them?

JOHN W. MASON.

JUDICIAL DISCRETION.

By a Looker-on in Venice.

To The Bar:—

It seems to "a looker on in Venice" that some of us are going wide of the mark in the discussion as to the province of a judge in construing the law.

It is not the old, old question of dispute between the Courts of Common Law, and Courts of Chancery, as to the jurisdiction of the latter to interfere with the former, but when the rule is plain and a general benefit, but harsh in the individual case, should the judge stand by the oath he has taken and apply the law, as it is written, or should he permit his sympathy, or courtesy, to control him, and apply what he thinks should be the law in the individual case?

When we remember, that the people through their representatives make the law, and judges are sworn to support

those laws; that we elect judges every little while and one has too much of "the milk of human kindness" in his composition, and sheds a tear over every individual who is arraigned, another is ambitious, cold, calculating, vindictive and cowardly, seeing no good in humanity and believing every man arraigned a criminal before he tries him; that a strict adherence to the law is the only guaranty of our liberty; that a corrupt judiciary is the worst evil that can befall any people, that in this day when "wrens may prey where eagles dare not perch," and the fight for party supremacy is as apt to place an ignorant demagogue, who can command votes, on the bench, as it is a gentleman of brains and integrity, it seems there could only be one answer to this question—let us have the law.

Where does judicial discretion fit in, under such circumstances? Judge Doolittle was unfortunate in his illustration, Cheating, to gain, is a crime in itself, and the penalty should be inflicted upon the criminal, whether the criminal had rosy cheeks, bright eyes and wore dresses, or was bleary-eyed, hideous and wore trousers. But Mr. Editor, Judge Doolittle erred on the side of chivalry and gallantry. He belongs to the old school and he can't forget his veneration for the ladies. Judge Doolittle would very promptly instruct the jury on your druggist case: "If the jury believe from the evidence that the Bar Druggist furnished whiskey to the Bar Sick man, without a prescription from a reputable practicing physician, and received payment therefor, they should find the defendant guilty."

Suppose the sick man had been a boy, instead of a man and the druggist had given him the whiskey without charge, under the circumstances mentioned in the Bar, and the druggist had been indicted, what disposition should the court instruct the jury to make of the case?

Why not take an actual case? Code of West Virginia, Chapter 151, Sec. 11, reads as follows:

"If any person shall set up or promote or be concerned in managing or drawing a lottery or raffle, for money or other

thing of value, or knowingly permit such lottery in any house under his control, or knowingly permit money or other property to be raffled for in such house, or to be won therein, by throwing or using dice, or by any other game of chance, or knowingly permit the sale in such house of any chance, or ticket in, or share of a ticket in a lottery or any writing, certificate, bill, token or other device purporting or intended to guarantee or assure to any person, or entitle him to a prize, or a share of, or interest in, a prize to be drawn in a lottery, or shall for himself or another person, buy, sell, or transfer, or have in his possession for the purpose of sale, or with intent to exchange, negotiate, or transfer, or shall aid in selling, exchanging, negotiating, or transferring a chance or ticket in, or a share in a lottery, or any such writing, certificate, bill, token or device, he shall be confined in jail not more than one year, and fined not exceeding five hundred dollars."

The ladies in our city play Progressive Euchre for a prize, not to exceed \$1.00; they adjourn from the home of one to the home of another member of the Club until they get around, and then go back to the first and repeat.

The Prosecuting Attorney indicts each lady who permits the game in her house under the clause "or by any other game of chance," in said section, what should the court instruct the jury to do upon the trial?

Yours,

Marlinton, W. Va., Feb. 1910.

R.

Judge Willis Returns to the Jacob Case.

To The Bar:—

A discussion which results in mere multiplication of words is seldom justifiable. A few statements in the **December Bar** may justify a renewal of some phases of our controversy.

Is it possible that the editor of *The Bar* has not read the **Jacobs case**, 98 N. Y. 98?—In the **December Bar** in speaking

of this case he says: "The landlords of tenement houses in New York were accustomed to insert a clause in their leases prohibiting tenants who leased dwelling houses for domestic purposes for using them as shops, and places for conducting various kinds of trades, such as shoe shops, cigar manufactories &c., &c., or for any other purpose than a dwelling. Mr. Roosevelt was a member of the legislature and believing that this prohibition in the lease was a hardship on the poor and that they ought to have the right to conduct business in their dwellings, had an act passed prohibiting the said prohibition in the leases. This act the Court of Appeals turned down" &c.

The act condemned by the court in the **Jacobs case** was chapter 272 of the laws of 1884, entitled "An act to improve the public health by prohibiting the manufacture of cigars and preparations of tobacco in any form in tenement-houses in certain cases, and regulating the use of tenement-houses in certain cases." Section 1 of this act prohibited the manufacture of cigars or preparations of tobacco in any form on any floor, or in any part of any floor, in any tenement-house, if such floor or any part of such floor was by any person occupied as a home or residence for the purpose of living, sleeping, cooking, or doing any household work therein. Section 2 defined a tenement-house for the purposes of the act. Section 3 exempted from the provisions of the act the first floor of a tenement-house in which was a store for the sale of cigars and tobacco. Another section provided the penalty for violations and a further section made the act apply only to cities having over 500,000 population.

It would be cruel to institute a comparison of the provisions of this act with the provisions of the imaginary act described by the editor of *The Bar*. Had the editor even the first point in the syllabus of the **Jacobs case** he could have guarded against such a blunder. It is as follows: "An act to improve the public health, by prohibiting the manufacture of cigars and preparation of tobacco in any form, in tenement-houses

in certain cases," (Chap. 272, Laws 1884,) held not within the police power, and unconstitutional." When the editorial writer is so profoundly ignorant of the basic facts of the controversy, I may be justified in preferring to state my own side of the case as well as to follow my own opinion of the issues I have tendered. When he has explained his own mental aberrations, there will be little left of his "deep and damnable fallacy."

I noticed on the first page of the cover of the last *Bar* a quotation from the address of Judge Carpenter, of Michigan, before the last session of the American Bar Association. The whole of that excellent address could be read with profit by those interested in the development of law. Judge Carpenter clearly shows that only a very small part of our law is crystallized upon the printed page. Part of the law is in writing, commands made by the people themselves or their duly authorized agents. But this is a very small part of the law, "only the fringe on the body of the law," nearly all of the law being unwritten. The law applied by the courts is the same law which regulates human conduct. What is the law which regulates human conduct? That is the question which courts are constantly striving to answer, but which they have not yet answered. The declaration of courts of last resort is not the law, but is the highest and best evidence of the law. We call it a precedent. There are two sources from which courts of last resort get the law which control human conduct. One of these is a study of conduct and consequences, applying to it principles of reasoning approved by the common judgment of mankind. The other is from decisions made by itself or other courts. In the first case the court is said to be deciding according to principle or common sense; in the second, according to precedent. Both sources should be used. As Judge Carpenter neatly puts it: "The truth is that to decide the law with even approximate accuracy, a judge must be neither a slave nor an enemy of precedent. He must be a master of precedent and he must also be a diligent student of human

conduct and its consequences, possessing a logical mind, able to reason correctly." A study of human conduct will avail little, I may add, unless the student is or becomes familiar with the conditions surrounding the persons whose conduct is being studied. The student must know or learn life and the judge is better prepared to arrive at a correct determination of controversies if he knows both precedent and life. For these two, according to Judge Carpenter, constitute the law he is to apply in these controversies. "The reason of the law is the life of the law; and when the reason ceases, the law ceases."

W. H. WILLIS.

New Martinsville, W. Va., Feb. 18, 1910.

JUDICIAL (IN)DISCRETION.

By Judge Edward S. Doolittle.

To The Bar:—

An article appeared from my pen in the January number of this periodical, responding to the following question:—"What are the true limitations of a Judge in dealing with a law, precise in its terms, that is harsh and impolitic in the application to a particular case?"

In answering the question, I relied upon the authority of Blackstone, as found in the first book of his Commentaries at Section Sixty-one, and concluding with the language:—

"For, since in law, all cases cannot be foreseen or expressed, it is necessary that, when the general decrees of the law come to be applied to particular cases, there should be somewhere a power vested of defining those circumstances, which (had they been foreseen) the legislator himself would have expressed. And these are the cases which according to Grotious, *lex non exacte definit, sed arbitrio boni viri permittit.*"

Professor Willey promptly takes up the gauntlet thus thrown down, assails the position taken by the writer, and in

the February number propounds some leading questions, "designed to draw from him his exact view point, and with the sincere desire and single purpose, not simply to test him, but to understand him and those of the same faith."

Before attempting to answer these questions, I hope the Professor will pardon the suggestion that in his criticisms of the position taken by the writer and others of the same faith, he doesn't always tote fair.

For instance, the articles contributed respectively by X. Y. Z. and J. R. D. (whoever they may be), have the heading: **Judicial Discretion**; but to the article contributed by J. R. D., who also declares in favor of Blackstone's text, as quoted, the editorial management of *The Bar* interpolated the heading,—**"As Measured By A Common Law Yard Stick."**

To the article contributed by the writer, the management prefixed the heading,—**"A Very Frank And Honest Avowal of Judicial Heterodoxy."**

Wise men have for many ages been wrestling with the meaning of the words, **Orthodoxy and Heterodoxy**. Those who believe in the doctrine enunciated by Blackstone will commend his orthodoxy; those who do not, will condemn his heterodoxy.

The idea that the text of Blackstone is theoretically and radically wrong, is the Professor's doxy.

The idea that Blackstone, in this respect, is everlastingly right, is my doxy.

Again, Professor Willey, while severely bombarding the writer's position, says: "In short, Judge Doolittle would have arrogated to himself the functions of all three departments of the Government, the Legislative, the Judicial and the Executive. He would have been the whole thing. He would have usurped the whole government of the Sovereign State of West Virginia, one of the United States of America! * * * * *

When the American people have discovered that instead of a representative government, they are being governed by an au-

tocrat under the title of a Judge, well—that's the end—that means revolution;—”

And the learned Professor might have added, to cap the climax, that such a lawless Judge, had he the power, would,—

“Pour the sweet milk of concord into hell,

Uproar the universal peace, confound

All unity on earth.”

Before propounding his leading questions, he says, by way of a preamble, that the writer (Doolittle) is defending a very desperate position.

Well, after reading the able contributions by Judge Miller and J. R. D., I found so much consolation, that I had about concluded that the tables had been turned, that my critical friend was himself on the defensive side, and would soon be fighting desperately in self-defense. Using his own language: “We are glad, too, that without any quibbling, qualification, or evasion, Judge Miller is willing to put himself on record in this distinct, clear cut and conclusive declaration on the point at issue.” And in an egotistical way, I had about concluded that it was not necessary for me to answer these questions, and that my article in the January number was a sufficient answer to each and all those questions.

And this was substantially my reply to the query of a lawyer, yesterday, as to whether I intended to answer Professor Willey's leading questions. “Why Judge,” said the lawyer, “if you will let Professor Willey lambaste you like that, without replying, you must be as patient as Job.”

And then upon reflection, I recalled that when Job's three friends accused him in the midst of his afflictions of having caused his own trouble by his faithlessness and hypocrisy, that Job was not slow to reply to their accusations; and that they were completely answered by his self-vindication.

As it is with most cases in court, there are two sides to the original question, propounded to a number of lawyers by the editorial management of **The Bar**.

It is not a new question in legal jurisprudence. It has been before the courts so long, that the memory of man runneth not to the contrary. One side represented by many text-writers, and by numerous courts and lawyers has always insisted on a strict adherence to the plain meaning and letter of the Statute, whether justice or injustice results in its application. The other side represented, we believe, by a greater number of legal practitioners have ever contended that courts are organized and are held to administer justice in all cases between man and man.

To the former class belonged Thomas M. Cooley, the great teacher and constitutional lawyer; to the latter Stephen J. Field, for thirty-four years Associate Justice of the United States Supreme Court.

Judge Cooley dissents from the authority of Blackstone, upon which we confidently rely, and deprecates the idea that courts have authority to give to Statutes such a construction as shall prevent inequitable results; He says that, "This would be in effect for the courts to take upon themselves, the power of legislation, and by construction to mould the Statutes to suit their own views of what is just and right." (See Cooley's Blackstone, Vol. 11 page 35 note.)

Mr. Justice Field, in *United States vs. Kirby*, 7 Wallace held that,—

"All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law, in such cases, should prevail over its letter."

Even Judge Cooley says, that while Constitutional provisions should always be treated as mandatory,—

"We do not say, however, that if a clause should be found in a constitution which should appear at first blush to demand a construction leading to monstrous and absurd consequences,

it might not be the duty of the court to question and cross-question such clause closely, with a view to discover in it, if possible, some other meaning more consistent with the purposes and aims of these instruments. When such a case arises, it will be time to consider it."

(Cooley on Constitutional Limitations, page 108.)

"No student", says one biographer, "ever left Judge Cooley's lecture room without feeling that he had listened to a great expounder of the law; and no student who came under his instruction and influence ever left the University without being conscious of a debt of gratitude to this teacher."

All the young lawyers of this city, who have been law students at the West Virginia University, pay to their former teacher, Professor Willey, substantially, the same glowing tribute of respect. But Judge Cooley never presided as a *nisi prius* Judge; nor has Professor Willey, so far, in his legal career; and if he never does, Burns' famous couplet:—

Man's inhumanity to man

Makes countless thousands mourn,—

will not be further verified by the opportunity it would thus afford of making a harsh and impolitic statute intensely practical.

As to those leading questions.

Professor Willey says:—"We are sure that Judge Doolittle is just as able and willing to give a reason for the faith that is in him, as we are to have it; and there are a few leading questions we hope he will have the goodness of heart to answer:—

1. Does he in administering his office as a Judge regard himself as administering a department of the government whose sole function is to give specific effect to the laws enacted by a coordinate department?

2. Does he not believe that the integrity of the three departments of our government is necessary to its very existence?

3. Does not any encroachment of the judicial upon the

functions of the legislative department tend to lessen both the authority and certainty of law, (i. e.) will the people accept a divided authority with the same respect and obedience, as if it were single?

4. Has not a legislature the right, and is it not expedient, in some cases, in order to prevent evasion, to make a statute absolutely prohibitive, even knowing and anticipating that it will work a hardship in exceptional cases (as for instance in regulating the liquor traffic)?

5. He will answer the above question, if he will answer this specific illustration: A druggist violates the law, if he sells whiskey without a physician's prescription. A man staggers into his store, weak, faint, and bleeding from injuries received from an accident. His friend (not a physician) calls excitedly for a glass of whiskey. The druggist believing that a life is in jeopardy, hands out the whiskey. The injured man, drinks it, is revived. His friend pays for the whiskey and takes him away. The druggist is haled into Judge Doolittle's court to answer an indictment founded upon the foregoing circumstances. What would Judge Doolittle do with the case?

6. If Judge Doolittle believes his own sense of integrity, singleness of purpose and experience as a Judge, justifies him in abating, modifying, or in any way diverting the operation of a statute from its literal purpose: what would he think of the propriety of the precedent he had made, if, as an American citizen, he had to take his own medicine from a successor who had neither integrity, character, experience, and probably a personal motive for exercising his judicial discretion?"

To the first question, I answer, No. I would not give specific effect to a statute that would, contrary to Section 5 of Article III of the West Va. Constitution, be imposing an excessive fine or inflicting cruel and unusual punishment. The question would be more applicable to federal courts having only statutory, but common law jurisdiction. I would not be unmindful of what Judge Dillon says in his work on The Laws and Jurisprudence of England and America, and that

is, "The common law is the basis of the laws of every state and territory of the union with comparatively unimportant and gradually waning exceptions."

A Circuit Court must take cognizance of Constitutional law, statutory law, common law, history and Christianity—the law of the land.

To the second question, I answer, Yes: but in the language of our **Bill of Rights**, (Section 20 of Article III of our Constitution),—Free government and the blessings of liberty can be preserved to any people only by a firm adherence to justice, moderation, temperance, frugality and virtue, and by a frequent recurrence to fundamental principles.

To the third question, I answer, No, to the first clause, and Yes, to the second clause; but will not unnecessarily take up valuable space in **The Bar**, by giving my reasons.

To the fourth question, I answer, No. The Legislature has no right, legal or moral, to enact an arbitrary law, that would absolutely, without qualification, require a court to inflict cruel and unusual, or barbarous punishment, or to administer injustice to any man.

An answer to the first question, in my opinion, does not necessarily, answer correctly the fourth question. If that druggist were on trial before me, sitting as the presiding Judge, and the evidence were in accord with the case as stated by Professor Willey, the druggist would be promptly acquitted; because he had only furnished the whiskey for medical purposes, as a medicine and not as a beverage; and because the selling would not be within the reason and spirit of the enactment.

To the sixth question, I answer, that if the case against me were within the meaning of the original question as answered by Judge Miller, J. R. D. and myself, and my successor were to give me my own medicine (such as I would give him, under similar circumstances) I would hold up my hands and bless him,—“O wise and upright judge! A Daniel come to judgment.”

Quaere. Does Professor Willey think that Judge Doolittle drinks whiskey?

Professor Willey also says in his preamble to the leading questions,—“We have learned sometimes that we were most certain of being right when we were most conclusively wrong.”

Now, by way of illustration and for the purpose of convincing him that he is wrong in the premises, let us suppose that he were to invite an Ohio law professor to pay him a visit at Morgantown—some gentlemen who still clings to the old-fashioned way of shaving himself. Finding that his razor is dull, he puts it in his pocket and carries it to a barbershop to have the razor sharpened; and when arrested, learns that he has committed a grave crime against a law of West Virginia. Of course his ignorance of the law is no excuse. According to Professor Willey's theory, he must be convicted and receive at least the minimum sentence,—a fine of not less than Fifty Dollars, and imprisonment in the County Jail for not less than six months. The West Virginia law professor flies to the Governor to obtain a pardon, but learns that his excellency will not interfere, on the ground that it is his duty strictly to execute the law as the Legislature has enacted the law and the Judiciary has administered it.

Imagine the Ohio law professor looking between the bars of his cell, for six long months, keeping his weary reckoning of the time and thinking about West Virginia and her laws, and about his friend in the University teaching law to young West Virginians.

If the time ever comes when the courts of this enlightened nation practice Professor Willey's theory of always adhering strictly to the letter of a harsh and impolitic statute, without regard to the circumstances of the particular case, then many people who, morally speaking, are innocent of crime, will be subjected to cruel and barbarous punishment; then, although receiving executive clemency, will many a

man and his family or relatives, through life, be subjected to the stigma of an ignominious conviction. When that time comes, and such a theory becomes the invariable practice of our courts, then,—

“Let thistles grow instead of wheat,
And cockle instead of barley, the words of Job are ended.”

Huntington, West Va., February 22, 1910.

WHY SHE LEFT.

To The Bar:—

The following is a clear statement of the trouble in a divorce case lately pending in Pocahontas county, West Virginia. The star witness says:

“In the first place that I knowd there was any difficulty in any shape or form was she come over to our house and I don’t recollect what time in the day she come, but she come to our house in the evening. He came after his day’s work was done. I set both across the river in a boat and when he came across he told me he was going to Rube Sutton’s after a grip or something. He just went on by the house and went up to Sutton’s. Her countenance had rather changed and she exclaimed something. She raised a kind of a laugh and it seemed to be sort of between a rejoice and a hatred, the idea of him going up and not speaking to her. After he had gone on I began to inquire into this thing a little by her. She was at my house and thinks to me this is two young couple, there is a difficulty between them. I began to talk to her to try to pacify her and get this thing quieted down if there should be anything. She just directly told be she did not love Ed. Sampson and she was not going to live here and I began to talk, and she made some light of it. She just pulled her ear this way. I am hard of hearing you know.”

NOTE—The above is an authentic copy of the answer made by an old man defendant. The subscriber who sends this to **The Bar** always enjoys a good thing, and says he hesitated as “to whether the above ought to go to **The Bar** or to Robt. W. Chambers who seems to be an observer of women.” There is always something funny happening in the Pocahontas courts and **The Bar** is always ready to print it.

THE BAR.

West Virginia Court of Appeals

Decisions Handed Down at the Last Term

Reported Especially for the Bar

Appearing Here for the First Time in Print

LAYNE, ADM'R., v. THE CHESAPEAKE & OHIO RY. CO.

Kanawha County. Affirmed.

Poffenbarger, Judge.

1. Bills of exception may be signed, certified and made a part of the record of a trial, at any time within thirty days after the adjournment of the term at which the judgment in the action was rendered, either in vacation or in a special or regular subsequent term of the court, occurring within said period of thirty days.

2. The office of the phrase "in vacation" in the clause of sec. 3979, Code of 1906, authorizing the taking of bills of exception after adjournment of the term at which judgment is rendered, is to empower the judge to sign, certify and make such bills parts of the record in vacation, not to limit or cut down the extension of time, impliedly granted for the purpose.

3. A special officer, appointed by the governor for police duty, at the instance of a railway company, under the authority conferred upon him by sec. 31 of ch. 145 of the Code, is *prima facie* a public officer, for whose act the company, procuring his appointment and paying him for his services, directly or indirectly, is not liable.

4. Such special officer has all the powers and privileges of a duly elected or appointed constable in the counties in which he filed

the oath taken by him, or copies thereof, and his public functions and powers are therefore more extensive than those of railway conductors, who are conservators of the peace only while in charge of their trains.

5. A public officer, specially employed by a common carrier to perform certain duties and services for it, is a servant of such carrier, while acting within the scope of such employment; and, if such servant, in the performance of such duties, wrongfully inflict injury upon a passenger of such carrier, the master is liable therefor, although the injurious act, so done, was wilful and malicious and prompted by motives and purposes, personal to the servant, such as resentment of insults or punishment for other wrongs perpetrated upon himself.

6. When the capacity in which a person, occupying the dual position of public officer and servant of a carrier of passengers, acted in a transaction in which he inflicts wrong and injury upon third persons, is uncertain and dependent upon conflicting oral testimony and inconclusive facts and circumstances, the question is one for jury determination.

7. If the injured party is a passenger of such carrier and the officer acted, in the transaction in which the injury was suffered, in the capacity of servant of the carrier, the question of liability is determined by the legal principles applicable in cases of injury to passengers by ordinary servants of carriers.

8. A carrier of passengers is under an absolute contractual duty to protect them from wilful and unlawful injury at the hands of its servants.

9. Provocation on the part of a passenger, such as interference with the servants in the exercise of their functions, abusive language, threats and assaults upon servants, although justifying expulsion from the train or other vehicle of carriage, does not bar recovery for injury inflicted upon him by the exercise of more force than is actually or apparently necessary to repel the assault or prevent other threatened injury.

10. A passenger does not cease to be such by reason of his alighting from a railway train at a station, other than his point of destination, for exercise or from motives of curiosity or to engage in an altercation with a servant of the company, if he does not leave the premises of the carrier, nor the train, with intention not to return to it and resume his journey.

11. In a case in which the person, inflicting injury upon a passenger, is both a public officer and a servant of the carrier, and his status as such officer has been established by one mode of appoint-

ment or election, it is not reversible error to exclude evidence of appointment or election to the same officer, or an office carrying the same power and authority, by another mode of conferring title, since no injury or prejudice could result from such error.

12. If in the trial of such a case, the capacity in which such person acted is uncertain and dependent upon oral testimony and inconclusive facts and circumstances, the proper inquiry for the jury is the capacity in which he acted in the particular transaction to which the infliction of the injury was incident, not the places or positions he held or occupied in general at the time, and instructions, telling the jury to find for the defendant, if they believe the actor was, at the time of the injury, a public officer, or performing the duties of such officer, and that the defendant is not responsible for his acts as such officer, are calculated to becloud the issue and mislead the jury, for which reason, the trial court may properly reject them.

13. The trial court may properly reject an instruction, in such a case, which tells the jury they should find for the defendant, if they believe the actor was the servant of the defendant and that the injurious act, incident to the particular transaction in which he was engaged, was not within the scope of his duty as such servant.

14. In such case, an instruction which tells the jury the defendant is not responsible for the infliction of death on a passenger, if they find from the evidence that the assault was committed by the actor when he was acting for himself and his own master, is calculated to mislead the jury and the trial court may properly refuse it.

15. The trial court may properly refuse, in such case, instructions telling the jury that, if the passenger left the defendant's train for the purpose of engaging in a quarrel or altercation with the servant or officer by whom he was killed, the carrier is not liable.

16. The trial court may properly reject an instruction which assumes the existence of a thing which the evidence makes an open question for the jury.

17. The trial court has discretion to refuse to permit the elicitation of evidence on the cross-examination of a witness, that ought to be introduced by calling the witness to testify on behalf of the party seeking such evidence.

18. The trial court has discretion to permit the asking of a leading question, when there is a basis for such action in evasiveness or reluctance on the part of a witness, and a new trial will not be granted for allowing such question to be propounded, when it does not appear that the discretionary power has been abused to the injury of the party complaining.

SALEM TERMINAL TRACTION CO. v. MCGRAW.

Harrison County. Judgment Affirmed.

Brannon, Judge.

SYLLABUS.

Under section 14, chapter 131, Code, in an action of assumpsit on contract the jury cannot, for *damages*, allow an amount beyond the amount of damages laid in the declaration; but it may add to that sum interest, though the aggregate exceed the amount in the declaration. And where the excess of the verdict over the amount laid in the declaration can be lawfully attributed to interest, the verdict is good.

BANK v. LOWTHER-KAUFMAN OIL & COAL CO., ET ALS.

Wetzel County. Affirmed.

Williams, Judge.

SYLLABUS.

1. A joint action may be maintained by the holder of a negotiable note and a joint judgment recovered against the maker and all the indorsers, if the note has been protested, or if protest and notice has been waived by the indorsers.

2. A cashier has no authority, simply by virtue of his office, to bind his bank by an agreement made with the indorsers on a promissory note, and unknown to the directors, to the effect that each of said indorsers shall be liable only for a certain proportion of the debt; and it matters not whether such contract relates to original notes presented for discount, or to notes taken either in payment, or in renewal, of pre-existing notes.

3. Notice to one of the directors of a matter affecting the interest of the bank which it is to the interest of such director to conceal, is not notice to the bank.

4. In a civil action, objection to the form of the oath administered to the jury to try the case can not be made, for the first time, after verdict. If the record shows that the jury were sworn, and the form of oath administered does not appear, this court will presume that they were properly sworn.

WEST VIRGINIA CENTRAL GAS CO. v. HOLT, JUDGE.

Barbour County. Writ of Prohibition Awarded.

Williams, Judge.

SYLLABUS.

1. In a case appealed from a justice of the peace to the circuit court by the party against whom judgment was rendered by the justice, and who has, on the trial in the circuit court, reduced the judgment of the justice more than five dollars, but who has not made the tender prescribed by the statute, the circuit court has no power to render a judgment against such appellant in favor of the appellee for costs about the trial in the circuit court, unless it be in a case "involving the title to specific personal property, or the possession of real estate, the freedom of a person, the validity of a law or an ordinance of any corporation, or the right of any corporation to levy tolls or taxes."

2. Prohibition lies to prevent the enforcement of an unauthorized judgment for costs rendered by a circuit court, notwithstanding the said circuit court may have jurisdiction to pronounce judgment upon the merits of the action.

CALLAHAN v. RUSSELL.

Barbour County. Reversed and Remanded.

Robinson, Judge.

SYLLABUS.

1. If one entitled to redeem land from tax sale, because of the ownership of an interest therein, obtains, within the year for redemption, by reliance upon her right to redeem, an assignment of the tax purchase in the name of her husband, upon which assignment a deed for the land is obtained in his name after the expiration of the year, equity will declare the transaction to be a mere redemption of the land.

2. The law which gives one a privilege of redemption will not suffer him to convert it into a privilege of purchase; and whatever

form the transaction between him and the tax purchaser may assume, it will be held to be in fact a redemption.

3. Where there is such relationship by privity or otherwise between parties owning interests in the same land that it would be manifestly inequitable for one of them to secure a tax title to the land to the exclusion of the title of the others, the acquiring of such tax title will be held to operate only as a redemption of the land.

LAMBERT v. LAMBERT.

Randolph County. Reversed and Remanded.

Robinson, Judge.

SYLLABUS.

A deed conveying land in consideration of marriage will be cancelled and a reconveyance directed, by the court of equity, where the guarantee has refused to consummate the marriage.

MYLIUS v. THE RAINE-ANDREW LUMBER CO.

Randolph County. Affirmed.

Poffenbarger, Judge.

SYLLABUS.

1. In the trial of an action, involving title to land, dependent upon the location of boundary lines and application of the title papers to their subject matter, it is not error to instruct the jury that they must give controlling influence to lines and corners marked upon the ground and identified, in so far as the lines were actually surveyed, and to courses and distances, in those instances in which the lines were not actually surveyed nor marked upon the ground.

2. It appearing that a large tract of land was subdivided into a number of lots and a plat thereof made, in accordance with which deeds were executed, and which is referred to in the deeds for the description of the lots, and that the exterior lines were only partially surveyed and only a few of the interior lines were actually surveyed, and there is inconsistency between the plat and some of the interior

lines so surveyed, it is not error to instruct the jury that, in locating any lot, it is to be governed and controlled by the plat, except in so far as it is in conflict with the interior lines actually run and marked upon the ground.

3. If a deed contain a general description of property, conforming to the manifest intention of the parties, as shown by the situation and circumstances surrounding them and the purpose they had in view, and also another description, clearly inconsistent with such circumstances and purpose, and false in that it applies wholly or partially to property not owned by the grantor, nor intended to be conveyed by him, but already owned by the grantee and not intended to be purchased by him, such latter description must be rejected as false and as having been inserted in the deed by accident or mistake.

4. When evidence has been introduced, tending to show a location in accordance with such latter description, the court may ignore it, in its instructions to the jury.

5. The construction of a deed, not dependent in any way upon extrinsic evidence, and also of a deed dependent upon extrinsic evidence, when the facts are undisputed, is a question for the court and not for the jury.

6. Evidence of admissions of the location of certain lines and corners of a tract of land, which are not in controversy in the trial of the action, do not estop the party making them, in respect to wholly different lines of the same tract of land, not otherwise conceded to be different from the locations indicated by the title papers, nor do they call for any instruction or other action on the part of the court, directing consideration thereof by the jury.

7. The rule requiring a claimant under an inclusive grant, to show that the land in controversy lies without the boundaries of the land excepted from the grant, as well as within the boundaries of the grant, has no application, if the grant has been subsequently forfeited for non-entry for taxation and sold in a judicial proceeding, at the instance of a commissioner of forfeited and delinquent lands, as a whole, and without exception of any portion thereof.

8. A deed made, by a commissioner of forfeited and delinquent lands, by virtue of such judicial proceeding, constitutes a new grant by the State, passing to the grantee all right and title of the state to the land, whether held by reason of its never having been previously granted, or by subsequent acquisition by forfeiture or purchase.

9. Though the opinion of a witness as to the location of a boundary line is inadmissible, the error in admitting it is harmless and does not call for a new trial, if there is no conflict in the admissible

evidence as to the true location, and the evidence is such as to preclude any other finding than that made by the jury and make the location found so clearly an established fact in the case that the court might ignore its existence in the instructions to the jury.

10. A party to a trial cannot complain, on a writ of error, of the admission of inadmissible evidence, superinduced by his own wrong, in introducing inadmissible evidence, calling for the evidence of which he complains, by way of rebuttal, unless the appellate court can see that such misconduct of both parties, indulged by the trial court, resulted in a mistrial and defeat of substantial justice.

McHENRY v. CITY OF PARKERSBURG.

Wood County. Reversed and Remanded.

Poffenbarger, Judge.

SYLLABUS.

1. Injury to real property, caused by a city, in the collection of surface water and casting the same upon the premises, by means of the grading and sewerage of its streets, so as to subject the same to occasional and intermittent submergence, gives right to recovery of temporary, not permanent, damages.

2. In the trial of an action for such damages, evidence of the difference between the value of the property before it was subjected to the injury and its value thereafter, is inadmissible, and, if admitted without objection, a verdict, based upon it, will be set aside upon motion.

3. A verdict in such an action, predicated partially upon evidence going beyond the true measure of damages and tending to prove the cost of altering the condition of the property so as to abate the cause of injury or render the property immune from its operation, in addition to the true elements of damages, the cost of repairing the injury to the property, reimbursing for expenses, directly occasioned by the flooding of the property, and compensation for loss of use of the property and rentals, destruction of, and damages to, personal property, and the like, should be set aside on motion, although the evidence was admitted without objection.

STATE v. MAYNARD.

Wayne County. Reversed; Defendant Discharged.

Robinson, Judge.

SYLLABUS.

An indictment for playing cards at a public place or place of public resort, other than a hotel or tavern, is not sustained where the evidence shows that the public were in every way excluded from the place at the time the playing occurred.

FLOYD v. DUFFY.

Kanawha County. Modified and Affirmed.
Poffenbarger, Judge.

SYLLABUS.

1. Creations and declarations of trusts in lands may be made and proved in this state as they could be in England, before the English Statute of Frauds, the seventh section of that statute, requiring the proof of such creations and declarations to be in writing, never having been in force in this state.

2. Though no contract for the sale of land is enforceable either at law or in equity, unless it be in writing, and no estate in land for more than five years can pass except by deed or will, there are many instances in which courts of equity except transactions, relating to land, from the operation of these provisions, on the ground that they stand upon equities independent of the contracts attending them, and established constructive trusts in favor of grantors as well as persons not mentioned in the deed.

3. That a conveyance by a deed, absolute on its face, was made merely to facilitate the accomplishment of some specific purpose, and not to confer upon the grantee any beneficial interest in the land, may be shown by parol evidence and a trust so established in favor of the grantor as well as third persons.

4. A trust in the proceeds of land, conveyed for the purpose of sale and conversion into money, may be established by parol evidence.

5. A parol trust in land, not enforceable, because inhibited by the statute of frauds, will be upheld in respect to the proceeds of the land, after the trust has been executed to the extent of conversion of the land into money.

6. A large number of town lots were conveyed by an absolute deed, reciting a valuable consideration, which is shown not to have been in fact paid. The conveyance was upon a parol trust for sale of the land by the grantee and division of the proceeds among himself, the grantor and a third party, within a time fixed, and reconveyance of the unsold lots, if any, to the grantor, on the expiration of the period allowed for sale. HELD: That the trust in favor of such third party is in the proceeds of the land only, and not within the statute of frauds.

7. The trial court may properly allow an amended bill to be filed, after the evidence taken has developed a state of facts, variant from those set up in the original bill, but not constituting a departure, as defined by the courts, nor a new cause of action.

8. The exercise of the discretion of the trial court, in permitting an amended bill to be filed, will not be disturbed by an appellate court, except in cases of abuse of such discretion.

TEEL v. COAL & COKE RAILWAY CO.

Kanawha County. Affirmed.
Poffenbarger, Judge.

SYLLABUS.

1. For wilful injury, inflicted upon a passenger of a common carrier by a servant of the latter, under provocation, by the exercise of force or violence, not justified under the principles of the law of self-defense, the carrier is liable.

2. Whether the circumstances warrant the force and violence used in such case, on the ground of real or apparent danger of death or great bodily harm, is a question for the ultimate determination of the jury, viewing the situation from the standpoint of the servant at the time, though he must decide it in the first instance at the peril of himself and his master.

3. In an action for damages for an injury, so inflicted, an instruction, requested by the carrier, telling the jury they should find

for the defendant, if they believed he exerted no more force than he deemed necessary, under the circumstances, is properly refused.

4. The law of self defense does not vary in the application thereof to felony, misdemeanor and civil cases.

5. It is not reversible error to give an instruction, correctly stating law applicable to the evidence adduced, though it is abstract in form and contains no express reference to the evidence.

PLANT v. HUMPHRIES.

Harrison County. Affirmed.
Robinson, Judge.

SYLLABUS.

1. If the record of a cause shows that the court had jurisdiction, it is conclusively presumed to speak the truth in that particular, and the judgment, unless successfully assailed for fraud or collusion, is binding until reversed upon appeal or such direct rehearing as may be warranted by law.

2. In a suit to sell the coal of an infant, the representation of the infant by a guardian ad litem who, it is afterwards disclosed, was interested in the sale and purchase of the coal, does not render the decree void for want of jurisdiction.

3. A decree for the sale of an infant's coal which sufficiently locates and designates the tract as a whole, but is not specific in defining the location of reservations of small parcels of coal therein, is not void for uncertainty.

4. Fraud in the procurement of a decree may be attacked at any time, if there has been diligence in discovering it and promptness in proceeding to attack it, notwithstanding the expiration of a day to show cause against the decree.

5. The interest of a guardian ad litem in the purchase of the infant's coal, sold in the proceeding or suit in which the infant was represented by that guardian ad litem, will render the sale voidable.

6. Where one has means of knowing or ascertaining his rights, where he is put on inquiry, where ordinary prudence should impel him to inquire, he must do so or else time runs against him in the assertion of those rights.

7. One who would repel the imputation of laches by showing ignorance of his rights must be without fault in remaining in

ignorance of those rights. Indolent ignorance and indifference will no more avail to prevent the bar of laches than will voluntary ignorance. Equity aids only the vigilant.

8. The possession of the surface land does not carry with it possession of the coal under that surface where the estate in the coal has been severed as to title.

9. For the surface owner to aver properly possession of coal severed in title from the land, he must state that he has had actual physical possession of the coal, apart from his possession of the surface, as by operating mines.

10. When the statute of limitations is applicable to a cause of action arising out of fraud, it runs from the perpetration of the fraud unless there has been fraudulent concealment of the cause of action.

11. Laches does not run against one asserting rights to real estate which he has had in possession during the delay in asserting these rights.

STATE v. COOL.

Preston County. Reversed and New Trial Awarded.
Williams, Judge.

SYLLABUS.

1. In order to sustain an indictment against a person for the sale of spirituous liquor, wine, porter, ale or beer, or any drink of a like nature, without having a State license therefor, it is necessary to prove that the sale was made within one year next prior to the indictment.

2. Where the trial court refuses to permit a question to be answered by a witness and it is made to appear by the bill of exceptions that the answer, if allowed to be given, would have been material to the issue, this court will assume that defendant was prejudiced by such refusal, and will reverse the judgment, set aside the verdict and grant a new trial.

3. When any drink, alleged to be intoxicating, is sold in labeled bottles, as put up by the manufacturer, and has a commercial name or designation, the evidence of persons who have purchased it from the defendant and drunk it, whether at the same time or on different days and occasions, as to whether it is intoxicating, is admissible both for the State and the defendant.

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West Publishing Company

New York

ST. PAUL

Chicago

THE BAR

VOL. XVII.

APRIL, 1910

No. 4

THE BAR

OFFICIAL JOURNAL OF THE

WEST VIRGINIA BAR ASSOCIATION.

Under the Editorial Charge of the
Executive Council.

Published Monthly from October to May.

Bi-monthly from June to September.

Entered as second class matter August
11, 1904, Postoffice, Morgantown,
W. Va., under the Act of
Congress March 3rd, 1879.

Price, per Copy.....\$.10
Yearly, in Advance.....\$1.00

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THE BAR is furnished at the nominal rate of \$1.00 a year, which is less than the cost of publication, and we would like to have the name of every lawyer in the State on our subscription list.

The Cabel County Bar Association has made an earnest appeal to have all the sessions of the Court of Appeals held at Charleston.

They have likewise formally endorsed Judge Keller for appointment to the prospective third Judgeship of the Fourth Judicial Circuit. A very urgent appeal has come to us for endorsement of another candidate for this place, whom we believe to be a worthy man living in Virginia, and we have reason to believe many are endorsing from rumor and reputation, which ought to be made a criminal offense when applied to candidates for the Bench.

Yankee ingenuity has invented a new means of preserving evidence. An important witness was about to die, and they had him talk into a phonograph, and if he does die they will offer it as testimony in the case. This is going some. Wigmore will have to revise his last edition.

Of the 139,783 deaths in New York State in 1909, pulmonary tuberculosis caused 13,948, pneumonia 9,400, cancer 7,034 and typhoid fever, 1,309. Of the 9,199 who died by violence, 1,490 took their own lives, 16 less than in 1908. The death rate was 16.1 per 1,000, a decrease of .2 from that of the previous year. There were 200,865 births, a falling of 2,294. This is a high bad-air record, and a low birth record. Only about 61,000 more births than deaths, and about 75 per cent of the births are of immigrant parents.

If, as Shakespeare says, "Sweet are the uses of adversity," the Sugar Trust ought to be able to turn its present predicament into cash.—New York Evening Post.

JUDICIAL REFORMS.

Depositions In Chancery.

The business of "reforming the Courts" is on, in State and Nation.

It has not yet reached the acute stage in West Virginia, but there is a latent movement on this line that will develop when the next legislature meets. A lot of hasty and inconsiderate legislation will, doubtless, be the result.

A legislative body is not the best agency for a work of this kind. The bar of the State ought to take the initiative by formulating and advocating such measures as are really needed to correct defects in our own Civil and Criminal procedure. The way is open for the State Bar Asso. to do a great work in this behalf.

This journal invites the bar of the State to use its pages liberally in suggesting and discussing any needed reforms in our judicial system. And if anyone has a measure to propose, we will print it, and it can be discussed pro and con, and then submitted for the action of the Bar Asso. at its annual meeting.

By way of introducing the subject, we herewith submit a proposition for improving our practice in the matter of taking depositions in Equity, and invite discussion upon it. As the basis of a bill to that end, we propose:

1. The Circuit Judge of each county shall appoint not less than two Masters in Chancery who shall be lawyers of not less than 5 years practice at the bar, and who shall qualify by taking such oath as the Judge shall prescribe.

2. Said Masters shall have the jurisdiction of a Circuit Judge over all matters relating to the taking of depositions in equity, including the admissibility and exclusion of evidence, the range and limitations of the testimony, the control of the parties, their attorneys and witnesses engaged therein as well as all other questions or matters that might properly

arise before a Circuit Judge in the same proceeding—subject to review and reversal by the presiding Judge of the Circuit.

3. On exceptions being entered of record to the admissibility, relevancy, range or limitation of any part of the testimony, if the Circuit Judge shall sustain the same, he shall mark the parts of any deposition improperly admitted with a marginal red line, and shall order such parts, so marked to be expunged at the cost of the Master presiding, and deducted from his compensation.

4. When the depositions in any case have been closed the Master shall report to the Court, in writing, his findings of facts proved, and file the same with the depositions. Such findings of the Masters as are not excepted to by either party may be accepted and acted upon by the court.

5. The Master shall receive as compensation \$5 per day for every day he shall preside at the taking of depositions, and if he also acts as amanuensis he shall receive \$10 per day and the latter sum shall also apply to the time he is employed in reporting his finding of facts in any case. The compensation of the Master shall be taxed as costs against the party calling him.

6. Masters shall hold their office during the pleasure of the Court appointing them.

The above draft is sufficient to indicate the purpose and plan of our proposition and furnish a basis for criticism by any one who may wish to discuss it favorably or adversely. Or if this is not the best plan, will somebody suggest a better one for improving a very unsatisfactory part of our Chancery practice?

In the matter of "levitations" and other forms of dispensing with the law of gravitation, Eusapin's table is far behind the Sugar Trust's scales.—New York Evening Post.

THE WIFE'S OWN BUT NOT ANOTHER'S.

We publish in this number of **The Bar** a communication from the Prosecuting Attorney of Webster County, Mr. H. C. Thurmond, calling attention to the alleged insufficiency of our statute to hold a man for arson who burns his wife's dwelling house.

We confess that a single reading of this Communication, without taking time to investigate the question raised, does not present to our mind a tenable position in law.

But when we reflect that the decision was rendered by Judge McWhorter, we are not disposed to dogmatically challenge its correctness. We have too much confidence in his judicial nose.

Nevertheless, here is the case presented:

A woman owns a dwelling house in her own right. The statute confers upon her that right to hold property separate and apart from her husband. Her husband gets mad and burns it. The statute also says that if any one burns the dwelling house "of another" he is guilty of arson. But you can't convict him of arson if he burns the property of his wife because the separate property of his wife was not the property "of another!"

If that was an indictment under the Common law we would accept this decision without question, but being an indictment under the Statutes of West Va., which make the wife the "man of the house," and the title being in her own name, we are puzzled to understand why she isn't "another," as distinct from the husband.

We don't know what to do with this case unless we refer it to Judge Doolittle and find out what he would do with it.

We are so certain that Judge Doolittle would march straight to the right of the matter that the Prosecuting Attorney of Webster County would not see any necessity for additional legislation.

We respectfully ask Judge Doolittle to come to our rescue.

SATISFIED.

There has seldom been an opinion handed down by our Court of Appeals that seems as satisfactory all round, as that in the Coal & Coke Ry. two cent rate case.

In the first place the parties on both sides are claiming the victory and ought to be satisfied.

The attorneys on both sides are claiming that they "won out," and what more could they ask?

And last, but not least, the public is jubilant, because we continue to ride on the two cent rate.

We are inclined to think the cream of the coconut is with the public. The 42nd point in the syllabus is what we, the people, were interested in to-wit: "42, Chapter 41 of the Acts of 1907 is, in all respects, valid on its face."

There are 51 points in the syllabus of the case, and the opinion, or opinions, make a volume of 85 pages. We publish the syllabus in this number of **The Bar**. It contains enough railroad law for one sitting.

We extend our congratulations to the public. We leave the attorneys, the parties, and the members of the Court to congratulate each other.

Congress is not going to grant any chromos to discoverers of the North Pole till they produce the pole. As the matter stands Cook and Peary agree as to the location of the pole and the conditions surrounding it and both claim to have hitched the flag to it, but neither was thoughtful enough to bring a souvenir. Congress is right. "The proof of the puddin' is the chewing of the bag."

MUST COME TO THE BAR WITH CLEAN HANDS.

The action of the Court of Appeals in refusing to admit Mr. Cook, who was charged with selling his seat in the Charleston City Council to the liquor interests, to practice law, will be salutary in its influence not only on the legal profession, but as a warning to corrupt officials.

The Charleston Bar Association is to be commended for its prompt and effective action in protecting the good name and fame of the profession. And the profession is to be congratulated that the highest Court of the State has set the precedent against opening the door of the legal profession to any man who is besmirched with moral turpitude.

It will hereafter be competent for a Court of the State, not only to require that the forms of law be complied with to establish the fitness of a candidate for admission to the bar, but to go behind the form—for the County Court's Certificate is but a form pure and simple—and establish the fact to the satisfaction of the Court.

We think the practice which obtains in some of the Courts of the State, for the Judge to appoint a committee of attorneys from the local bar, to inquire and report on the fitness of a candidate before passing on his admission, is an eminently appropriate and salutary method. There is no good reason why it might not be adopted in all our Courts.

We felt a profound sympathy for Mr. Cook during the pendency of the investigation, but when the Court declares itself unanimously satisfied with the proof, there was a sense of relief in the reflection that no injustice was being done, and further, that a good precedent had been established.

LAW OR ANARCHY—WHICH?

When a strike occurs it seems to be in order to suspend the laws and for the officers of the law to take a position of armed neutrality.

It has been a suggestive spectacle in the great city of Philadelphia to see riot and murder rampant on the streets, the public utilities in the hands of the mob, property of the citizens ruthlessly destroyed, business virtually suspended, the lives and limbs of citizens in jeopardy, and the officers of the law taking passive observations, and virtually saying "go ahead and fight it out, but do as little damage as possible!"

At other times if two men should have a personal encounter on the streets all the police force of the city, if necessary, would be called into action to suppress it, the participants would be instantly jailed, the crowds would be promptly dispersed and every semblance of disorder would be summarily dealt with.

But when a mob of ten or twenty thousand menace the lives, and business, and property of a city and take the law in their own hands to secure a business advantage, instead of the whole civil and military power of the State Government being put promptly in the breach, if necessary, to restore law and order, the Mayor, the Governor, the Police, the Sheriff, sit supinely by and say, that although this mob has murder in its heart, and destruction of property in its purpose, and is openly defying the law, we will wait for overt acts—we must not seem to take a partisan attitude in dealing with it!

It would seem to the ordinary observer of these periodical events, that it is about time we had some specific legislation to govern a strike, inasmuch as a strike does not seem to be subject to the ordinary laws governing breaches of the peace.

If there are times when anarchy is permissible under our government, let's define its limitations at least. If we are to have law and order for everybody, let's have it.

TRYING CASES OUT OF COURT.

Every one who has had any experience in public journalism knows that the chief concern is not so much to find something to publish as to keep out something that ought not to be published.

Unless the editor is constantly on the alert, something is creeping through the back door into his journal that will do some person or some interest injustice.

The editor may publish a thousand good things and never hear anything about them or get any special credit for them, but if one bad thing finds its way into an obscure corner of his journal there are a hundred critics rushing to the front seeking the honor of exposing it.

This by the way of referring to the common impropriety of discussing cases that are pending in the courts. No reputable journal will discuss a pending case in a partisan spirit or with a purpose of influencing the decision of a court. It is even questionable whether he can with any propriety comment on it for any purpose. Surely a law journal would be regarded as committing a breach of professional ethics to do so.

An article appeared in the last number of **The Bar** that was open to criticism in this regard. It was not an editorial expression, yet no article that is subject to such a criticism should pass the editorial scrutiny, and the editor cannot absolve himself from responsibility if it does. The article in question was a review of one of the briefs in a case pending in our Court of Appeals,—a commendatory and complimentary review—and while there was no apparent purpose of influencing the decision of the case, and we have no idea that it did or could, yet we do not undertake to defend its publication, or to excuse our responsibility for it; but refer to it now rather to confess a breach of professional propriety and to prevent anybody relying on it as a precedent to obtain a like publication in the future.

UNCLE SAM'S COURTS.

Among the reforms in the judicial system projected by Uncle Sam is the entire abolition of the U. S. circuit courts.

Although this is but one item in the bill for the revision of the judiciary laws, it is probably the most radical.

The reason urged for this measure is that District Judges sit in circuit courts and transact nine-tenths of the business. It is pointed out that there is no reason for the maintenance of circuit courts where certain cases may be brought in district courts, others in circuit courts, still others in either court, while frequently it requires a decision by the United States Supreme Court to determine which is the proper court for an action to be brought in.

With Circuit Court Judges sitting in the United States Circuit Court of Appeals, as they frequently do, the abolition of the court will have no effect upon their tenure of office. It will affect the tenure of office of a number of clerks and deputy clerks, although, as in the case of Judges, more than half of the district court clerks do the work of the circuit courts. The passage of the bill will result in the abolition of seventy-six circuit courts in the United States proper.

WHY COMMERCIAL LAWYERS GET RICH QUICK.

Man wants but little here below. Here is a claim just received. Who wants to handle it? This is not a joke, but a *bona fide* letter received in regular course of mail.

Gentlemen:—We enclose herewith a statement of open or merchandise account by.....amounting to 20c.

For some reason or other we are unable to procure settlement direct. It is therefore our desire that you arrange with debtor to procure this settlement at your very earliest convenience.

We regret the insignificant amount of this claim, but it seems to be the only method of procuring the justice that we are entitled to.

We obtained your name from the.....as per enclosed tag.

Very truly yours,

THE ANNUAL MEETING.

The Executive Council has fixed the dates for the next annual meeting of the State Bar Association, on the 14th and 15th days of July.

These seemed to be the dates that would be freest from conflicts with other matters, and accommodate most persons concerned.

The program for the meeting is in process of preparation. The address of President Haymond will be on the topic "Our Law of Eminent Domain." The annual address will be delivered by Secretary Nagle, but he has not yet announced his topic.

The Association meets this year at White Sulphur Springs, and promises to be well attended and well enjoyed.

2

"WE DONT HAVE TO."

Forty odd years ago when West Virginia had separated from the mother state, and was making a constitution of her own, she incorporated in that instrument a declaration of her purpose to assume an equitable proportion of the debt of Virginia.

As a practical evidence of her good faith she thereupon appointed a commission to meet and confer with the officials of Virginia and arrive at an equitable basis for determining West Virginia's proportion of that debt. But Virginia snubbed our commissioners, and refused them even the common courtesy of a conference.

Thereupon Virginia arbitrarily assigned and set apart one-third of her indebtedness as West Virginia's proportion, and issued certificates, which without any conference with or authority from this state she denominated "West Virginia's Certificates," which were intended to represent West Virginia's liability for one-third of the debt.

These certificates Virginia put upon the market and either converted into money which she put in her treasury, or used them as an off-set with her creditors in paying her debt.

Now after forty odd years of postponement or repudiation of her debt, she makes an unconscionable bargain, or barter, or gamble with the holders of those "West Virginia Certificates" by which she agreed to masquerade as plaintiff in a suit against this state, for a consideration in which she wipes out a large slice of her indebtedness whether she wins or loses.

Now after forty odd years of postponement and refusal to settle, she attempts to make a case in court that would impose an obligation upon West Virginia to pay from twenty to fifty millions, with interest, of her debt—with an apparent endorsement of that holding by the Commissioner in the case.

More than forty years ago—more than forty years before Virginia was a state,—a very distinguished and able English Judge, announced as a Cardinal rule of his court that, "Nothing can call this court into activity, but conscience, good faith, and reasonable diligence." And that principal has come down to us with the force of a judicial maxim, and has been accepted and adopted as a reasonable test of the standing of any suitor in any court in all judicial tribunals of the world from that day to this.

Measured by this standard we do not believe the highest judicial tribunal of the nation, when it comes to look this case squarely in the face, will find any equity in Virginia's attitude or contention.

Moreover, while the people of West Virginia are too honorable to repudiate any just claim upon her treasury, if we are disappointed in the final outcome of this controversy, and any attempt is made to fasten upon the state such a claim as Virginia is now making, and West Virginia is called upon to respond to such a demand, her answer will be, "We dont have to!"

WHAT DOES THE BAR SAY?

In the last number of **The Bar**, we published two papers from two distinguished members of the judiciary of the state, Judge Doolittle, and Judge Mason, that fairly and very fully and clearly present the two opposing views as to the limitations of judicial discretion.

If we intepret Judge Doolittle's position aright, he holds that if, in the opinion of a judge, a law is unjust, harsh, or impolitic in its operation, he would modify, mollify, or altogether defeat its operation, even where the terms of the law were plain.

If we understand Judge Mason's position, he holds that judicial discretion has nothing to do with the policy or impolicy of the law when the legislative intent is plain—that the law is above the judge as well as any other citizen, and there is no officer so high in this Republic that he is not just as amenable to the law as the humblest citizen.

Now, with these two different attitudes of the Bench clearly defined, we would like to hear from practicing attorneys who sit before the bar from day to day, what they think of the practical operation of the two viewpoints of judicial discretion; which they prefer; how much judicial discretion they can stand; and what are its practical results.

Opinions and observations by members of the bar, along this line, would be entertaining and instructive, and would do much good. We hope they will contribute freely, and they can write anonymously or otherwise as they prefer.

The Duke of the Abruzzi deserves credit for the arctic travel and mountain-climbing he has accomplished without precipitating any controversies.—Washington Star.

ARSON; OUR STATUTE AND IT'S OMISSIONS.

Webster Springs, W. Va., March 4th, 1910.

To The Bar:—

At the February term of Court here, a case of arson was tried and it's results point out a serious omission in our statute on that subject. The facts in this case according to the evidence, were substantially as follows: The defendant and his wife, had lived together as man and wife, for several years in her own house—property to which she derived title from her former husband by Will, and, under the law, her own separate property. And some family troubles between them occasionally brought out threats from the defendant that he would burn the house and leave the country &c: and, in August 1908, he carried these threats into action and while the wife and children were absent at a neighbor's nearby he set fire to the house and burnt it down:—the State making a good strong case against him, and rested.

The defense then made a motion to exclude the evidence and direct a verdict of acquittal, upon the ground that although the defendant be proven guilty of the offence charged in the indictment, the fact that he and his wife were living together as man and wife at the time of the commission of the offense, he could not be convicted or punished under our statute as it was his dwelling house as well as the dwelling house of his wife, they being one, and that in legal contemplation, it could not be deemed the "dwelling house of another" but was his own dwelling house.

The Court, after hearing the argument on both sides, made a careful examination of the authorities, and was forced, very reluctantly, to sustain the motion and direct a verdict of not guilty.

The Court cannot be criticized for its holding in such a case: the blame rests with the Legislature in omitting to provide for just such crimes as this defendant committed, as the

law, as laid down in the books, is clearly in favor of the defendant on this point, and I am sure that all good citizens will concur with the Judge who tried this case in expressing the hope "that this apparent miscarriage of justice might lead to some speedy legislation on the subject."

And I hope that the members of the Committee on Legislation, as well as others, will bear this instance in mind and, at the next meeting of the Legislature endeavor to provide a statute covering this crime.

Yours truly,
H. C. THURMOND.

REHEARING ON A BRIEF.

Charleston, West Virginia, March 10th, 1910.

To "The Bar"—

On looking over the March number of the Bar I find an article, apparently editorial matter, headed "Coal & Coke Railway Company Case," in which the writer, after having read the brief of the Attorney-General, and evidently without having read the record of the brief on behalf of the Railway Company, proceeds to render the judgment of the "Bar" on the case. This writer states that it seems to him that the argument made by the Attorney General to show that equity does not have jurisdiction of the case is supported by reason and authority, and that the adjudications disclosing an adequate remedy at law without resort to a court of equity are pertinent and quite decisive, as shown by the Attorney-General in his brief; also that the argument on the validity of the act is very cogent and presents the State's side of the case in a clear and very lawyer like manner. The article then uses this language:

"In arguing the question whether or not the act is confiscatory as to plaintiff's railway, the Attorney-General has gone into detail with reference to the evidence adduced by the plaintiff, has made a rigid analysis of it,

and has quite conclusively shown in our judgment that the plaintiff has signally failed to establish that part of its bill charging that the operation of the law deprives it of its property without due process of law."

It seems to me that if **The Bar** is going to undertake to give its opinion on cases after they have been argued and submitted to the Court of Appeals, but before the decision has been rendered, it ought, at least, to read the briefs on both sides, even if it does not read the record; though it is generally considered amongst the profession necessary to read the record in a case in order to render a correct decision on the merits, especially where the decision involves the passing upon the facts as well as the law.

It seems that the Judges of the Court of Appeals unanimously differ from **The Bar** in the decision of this case, which was rendered after the article in question was published, and presumably after it had reached the Judges. In order that **The Bar** may revise its findings and grant the Coal & Coke Railway Company a new trial, I take the liberty of sending you the briefs which were filed on behalf of the Coal & Coke Railway Company before the Supreme Court, and also suggest that you get a copy of the record from the Clerk. I have no doubt he will furnish you a copy freely. If, after carefully reading the record and the briefs on both sides, **The Bar** still adheres to its decision that the plaintiff has signally failed to establish its case, we will submit gracefully to the decision, though we confess it will be somewhat embarrassing to have two decisions directly opposed to each other in the same case, by Courts of concurrent jurisdiction.

Allow me in conclusion to suggest that in order to avoid this conflict of opinion and jurisdiction, the safer rule hereafter for **The Bar** to follow will be to postpone its own deliverance in any case until after the Court, before which it has been argued, has rendered its decision.

Yours very truly,

GEO. E. PRICE.

PREFERENCE BY INSOLVENT.

By Faciebam.**To The Bar:**

An intent to hinder or delay creditors is one thing: giving a preference is another thing: the statutory effect of a conveyance is still another thing. Under 13 Eliz the statutory effect of a conveyance with intent to hinder is that it is valid between grantor and grantee but void between the grantee and the creditors of the grantor. The act of 1891, sec. 2, ch 74 of code, doubtless expressed a legislative intent to avoid the preference but not the conveyance. It would seem that, no matter what be the intent, if the conveyance prefers the grantee, its statutory effect, under the act of 1891 is to dedicate the property to all creditors—including the grantee. An insolvent owes his friend \$1,000 and, intending to prefer him, sells him a farm worth \$5,000,—the \$1,000 debt being the cash payment. If the insolvent owes \$10,000 his friend can retain only his pro rata of the \$1,000. But suppose the intent was to hinder and the friend had notice of this intent, then, under 13 Eliz, the friend can retain nothing: he cannot set up any part of his \$1,000 debt.

Has a creditor the right to invoke both 113 Eliz and the act of 1891 in the same suit? Counsel for plaintiff in *Baer v. Williams*, 43 W. Va., doubtless supposed that he had offered a bill with a double aspect but Judge Dent, page 326, seems to have considered that it presented two different causes of action. The syllabus does not touch the question before us. A bill under 13 Eliz must exhibit facts proving the intent to hinder: a bill under the act of 1891 alleges insolvency and exhibits a preference. The ancient bill did not make special prayer: it stated the facts and the court gave such relief as such facts entitled plaintiff to.

In *Harrold v. Barlow*, 47 W. Va., the conveyance gave a preference. The bill said that the conveyance was made with

intent to hinder and, if such intent did not exist, then plaintiff claimed relief under the act of 1891. Judge Brannon doubted whether the intent to hinder was proved, but his opinion assumed that Harrold would be entitled to relief against the preference if he had filed his bill in time. Suppose Judge Brannon had found the intent to hinder and suppose the bill had been filed in time, would the relief be based on the conveyance being void or would relief be based on the preference being void?

It is easy to suggest a predicament of facts entitling plaintiff to relief under both 13 Eliz and this act of 1891. "Entitled to relief" means subjecting the property to plaintiff's debt. If all creditors, except the grantee, unite as plaintiff then the only difference in the relief will be that, under 13 Eliz, the grantee whose debt is preferred has no claim, whereas, under the act of 1891, he is entitled to his pro rata.

The difficulty lies in the difference between a conveyance which is void as to creditors who are hindered and a conveyance which is void only as to the preference. Observe, in either case the grantor is divested: he has no voice: it is a controversy between the grantee and the creditors of the grantor. But there is this difference, 13 Eliz expects the grantee to surrender the property: the act of 1891 expects him to keep it but to account for all of its value except his pro rata. If the intent be to hinder, the sheriff may levy, but he dare not levy if it was a preference.

The cause of action or ground of suit, must not be confused with questions about plaintiff's relief. The ground of suit is the fact that the debtor placed his property beyond the reach of an execution.

We are not yet accustomed to the new status created by this act of 1891. Observe a careful reading of the act as it now stands:—

Every transfer by an insolvent, attempting to prefer a creditor, shall be void as to such preference but shall

- be taken to be for the benefit of all creditors, and all the property, so attempted to be transferred, shall be applied pro rata: provided, that any such transfer shall be valid unless a creditor brings suit to set aside and avoid the same and cause the property, so transferred, to be applied pro rata.

Observe. The transfer "shall be valid unless attacked." Does this mean that the transfer shall be void, if attacked? Again. The act does not apply unless an insolvent "attempts" to give a preference. Suppose an insolvent trades a \$50 horse for a \$500 debt, does he "attempt" to give a preference? It seems that an insolvent who transfers a \$100 horse in payment of a \$95 debt does give a preference, and the court will sell the horse and pro rate the proceeds. If the court sells the horse, is not the transfer as much set aside as if the proceeding was under 13 Eliz?

It is difficult to see a difference, in principle, between transferring a horse in payment of a debt, and transferring him to a trustee to secure a debt.

Our court has not yet passed on the difference, if there be any difference, between the relief if the intent is both to hinder and to prefer, and the relief when there is no intent except to give a preference.

The act of 1891 says, if an insolvent "attempts" to give a preference the property shall be prorated. 13 Eliz says, if the intent be to hinder, the conveyance is void. Local law says, filing a bill under 13 Eliz gives a lien. It seems that in *Bank v. Parsons*, 42 W. Va., neither insolvency nor the act of 1891 was mentioned in the court below. The bank attacked because the intent was to hinder. Strange to relate the bank did not get priority. Judge Holt says:—"Appellee contends that the act of 1891 does not apply where the conveyance is charged to be fraudulent, but I don't think it can be given so limited an application." Syllabus one says: Where an insolvent gives a preference the conveyance will be dealt with as required by

the act of 1891 whether such conveyance be bona fide or fraudulent. *Bank v. Prager*, 50 W. Va., restricts syllabus five in *Bank v. Parsons* to suits to avoid a preference, but does not disturb syllabus one. In *Gilbert v. Peppers*, 65 W. Va., the bill was attacked because the intent was to hinder and also because the conveyance gave a preference. Judge Poffenbarger said the act of 1891 did not apply because the bill was not filed in time, and the attacking creditor acquired a lien.

Some day the court may have a case as follows:—an insolvent owes his father \$10,000 and the bank \$1,000. Father and son conspire to hinder the bank and the son conveys to his father a \$10,000 farm in payment of this debt. The bank attacks proving the intent to hinder and alleging insolvency. If we don't misapprehend *Bank v. Parsons*, the father will take ten-elevenths of this farm. Prior to the act of 1891 he would take nothing.

This act of 1891 may bring unexpected fruit. When preacher Jones was in the legislature he passed a law that no bar-room should be conducted within fifty yards of any church. His constituents moved the church.

West Virginia Court of Appeals

Decisions Handed Down at the Last Term

Reported Especially for the Bar

Appearing Here for the First Time in Print

IN THE APPLICATION FOR LICENSE TO PRACTICE LAW.

License Refused.

Miller, Judge.

SYLLABUS.

1. On application to this court for license to practice law, as provided by section 1, chapter 119, Code 1906, and the rule of this court made pursuant thereto, the order of the county court, as to the good moral character of the applicant, will be treated as prima facie evidence only, and the provision of the statute relating thereto will be construed as prescribing what legal effect as evidence should be given thereto when standing alone and uncontradicted.

2. The right to practice law given by said statute is not a *de jure* right, and the word "may" employed therein, in the provision that this court "may" upon the production of a duly certified copy of the order of the county court grant such applicant a license to practice law in the courts of this State", will be construed to have been used in its popular, or permissive sense, and not as synonymous with the word "shall"; and if upon application for such license and objection to the granting thereof it be clearly shown that the applicant has not the

requisite good moral character entitling him to admission to practice law in the courts, his application for such license will be denied.

3. A case where, upon charges against an applicant for license to practice law, and protect and objection to granting him license preferred by a bar association, and upon the evidence adduced in support of said charges, he was adjudged not entitled to such license and license refused.

BROWN v. BROWN.

Monongalia County. Decree Affirmed.
Brannon, Judge

SYLLABUS.

1. One of several remaindermen in land after a life estate cannot have partition during the continuance of the life estate, even though he has acquired that life estate, unless he waives that life estate.
 2. *Otley v. M'Alpine*, 2 Grat. 340, disapproved.
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COAL & COKE RY. CO. v. CONLEY AND AVIS.

Kanawha County. Reversed in Part, and, in Part, Modified and Affirmed.
Poffenbarger, Judge.

SYLLABUS.

1. There is no difference between courts of law and courts of equity, in respect to their inability to entertain a proceeding against the state.
2. Interest on the part of the state, in the subject matter of a suit to which it is not a formal party upon the record, must be immediate and direct, not merely incidental or consequential, to bring such suit within the inhibition of sec. 35 of Art. VI of the Constitution, declaring "The State of West Virginia shall never be made defendant in any court of law or equity."
3. The interest of the state in the penalties, prescribed by a sta-

rate, limiting the charges of railroad companies for transportation of passengers, does not constitute an immediate and direct interest in a suit brought by a railroad company to have such statute declared unconstitutional and void. It is sequential and direct.

4. In such a suit, the real issue is whether the complainant is entitled to charge a higher rate than that prescribed, and amounts to a controversy between citizens over the validity of a law, analogous to that which arises on a writ of *habeas corpus*.

5. On an issue between a citizen and an officer, involving the constitutionality of a law, the state, considered an ideal, intangible person, as contradistinguished from the state government, its agent, government equally within the protection of the organic law and not favoring either as against the other.

6. The officers of a state act in a representative capacity and bind it by their acts only in those instances in which they have authority, the law under which they act constituting their power of attorney; and, when, for any reason, such law is void, the act done under it is likewise void and amounts to no more than an individual wrong and trespass.

7. A suit against an officer, acting, or threatening to act, under an unconstitutional statute, with the enforcement of which he is charged, is a suit against him in his individual capacity, as for a wrong done by him, and not a suit against the state, unless it directly involves a contract right or liability on the part of the state government or property belonging to it or in its custody.

8. It is no objection to the remedy in such case, that the statute, the application of which in the particular case is sought to be prevented, is not void on its face, but is complained of only because its operation in the particular instance works a violation of a constitutional right.

9. Nor is it material that the officer's color of authority for the enforcement of the act is found, not in it, but in the common law or some other statute. That he has some connection with the enforcement of the act is the important and material fact, whatever its source or origin may be.

10. Unconstitutionality of the act is not alone sufficient to confer jurisdiction of such a suit or proceeding in equity. To this there must be added, for such purpose, some right or injury, respecting the person or property, not adequately remediable by any proceeding at law.

11. When the two grounds for relief, just mentioned, exist, the

remedy in equity is not precluded, though it involves restraint, by injunction, of a criminal proceeding.

12. Under such circumstances, restraint of a criminal proceeding is merely incidental to adequate protection of a personal or property right, and is not founded upon the mere illegality of such proceeding. Its chief object being the maintenance and protection of such right, the bill is not one merely to enjoin such a proceeding.

13. A wrong, attempted by an officer under color of a void statute, will be enjoined as readily as one attempted by a private person in violation of law and without color of office, if sufficient grounds for injunction, under the rules and principles governing the subject, are shown. Both acts are trespasses, though the former is analogous to tyranny and the latter a mere personal act.

14. In ignoring an unconstitutional statute, limiting its charges for transportation of passengers, and appealing to a court of equity for protection against criminal proceedings to compel compliance therewith, a railroad company relies, in part, upon the legal principle, allowing an injured person, under some circumstances, to redress, by his own hands, the wrong done him.

15. In form, a bill filed for such purpose is a pure bill of injunction, not ancillary to any other suit or other direct relief sought by it, but ancillary to a proceeding out of court. Nevertheless its real and substantial purpose is the determination of the validity of the statute, indirect determination thereof arising *exnecessitate* from lack of any adequate form of direct adjudication upon the question.

16. There being no form of action at law, appropriate to the protection of possession and enjoyment of property by the owner thereof, and damages and criminal penalties for trespasses, being inadequate, when recoverable and enforceable, injunction is the proper remedy therefor.

17. Neither physical destruction nor injury of property, nor total deprivation of the use and enjoyment thereof, is a *sine qua non* to judicial remedy, if wrongful. An unlawful and injurious restraint upon the use and enjoyment thereof in any form, being in law a deprivation of property *pro tanto*, suffices.

18. A statute, imposing a limit upon the rates to be charged by a public service corporation differs in nature from many others in that it relates to the use of private property, and there is a constitutional limit on the powers of the legislature, respecting the same, dependent upon a question of fact.

19. A proceeding for the relief of a public service corporation

from illegal legislative restraint upon its charges may be prosecuted by such corporation in its own name.

20. Though the public has an interest in the use of private property, devoted to a public service, as in the case of a railroad, and the legislature may, by statute, limit the charges for such service, it cannot reduce them below the point of fair and reasonable remuneration for the service rendered.

21. Legislative reduction of such charges so as to prevent the earning of such remuneration amounts to a taking of private property for public use, without compensation to the owner thereof, and a rate regulating statute, so operating, is void, in so far as it has effect, being in conflict with sec. 10 of Art. III of the Constitution of this state and the Fourteenth Amendment to the Constitution of the United States, inhibiting deprivation of property without due process of law, and also with the equality clause of said amendment.

22. A public service corporation is entitled to a judicial inquiry as to whether, in point of fact, a rate regulating statute is confiscatory, and, if the legislature has failed to prescribe or designate a mode of determining such question, the party aggrieved may invoke any appropriate remedy therefor in law or equity.

23. If penalties are prescribed in such a statute as a sanction for the due enforcement thereof, and the persons and corporations affected thereby are not expressly or impliedly excepted from the operation of the penal clause, pending such judicial inquiry, and the penalties are so heavy and severe as to expose such persons or corporations to great risk of loss in prosecuting such inquiry, the entire statute is void on its face in so far as it so interferes, unless the penal clause is separable from the rate prescribing clause, in which case the former is void to the extent aforesaid.

24. A statute, so obstructing resort to the courts for inquiry as to a fact, limiting the power of the legislature, respecting the subject matter thereof, would conflict with sec. 17 of Art. III of the Constitution of this state, declaring "The courts of this state shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay", and also with the Fourteenth Amendment to the Constitution of the United States, guaranteeing to all persons the equal protection of the law.

25. While obeying such a statute, without question, or merely violating it, by exacting higher rates than it allows, such corporation maintains the statute of condition, upon which the legislature intend-

ed the penal clause to operate, in the absence of a different intent expressed in the statute.

26. By the institution of a suit to determine whether such a statute is confiscatory in its operation in a particular case, such corporation alters its status from that of a mere corporation, engaged in the public service, to that of a contestant of the legislative claim of right to take its property without due process of law; and in the absence of expression of intent to the contrary, it is presumed the legislature did not intend to affect, or interfere with, the assumption maintenance of such status, nor to legislate upon the subject of such remedy; and the penal clause of such a statute, silent on the subject of remedy, has no application, while a suit is pending, in good faith, for the determination of such question.

27. In determining the meaning of a statute, it will be presumed, in the absence of words therein, specifically indicating the contrary, that the legislature did not intend to innovate upon, unsettle, disregard, alter or violate, (1) the common law; (2) a general statute or system of statutory provisions, the entire subject matter of which is not directly or necessarily involved in the act; (3) a right or exception based upon settled public policy; (4) the constitution of the state; nor (5) the Constitution of the United States.

28. It is the duty of a court to restrain the operation of a statute within narrower limits than its words import, if the court is satisfied that the literal meaning of its language would extend to cases which the legislature never designed to include in it.

29. Courts will never impute to the legislature intent to contravene the constitution of either the state or the United States, by construing a statute so as to make it unconstitutional, if such construction can be avoided, consistently with law, in giving effect to the statute, and this can always be done, if the purpose of the act is not beyond legislative power, in whole or in part, and there is no language in it expressive of specific intent to violate the organic law.

30. Covering only a part of the subject of railway rate legislation, Chapter 41 of the Acts of 1907 does not wholly repeal former legislation, relating to the same subject, either by implication or express provision. It impliedly amends Chapter 227 of the Acts of 1872-3, as amended by Chapter 42 of the Acts of 1885, repealing such former legislation only so far as it is clearly inconsistent therewith.

31. For the purposes of Chapter 227 of the Acts of 1872-3, as well as Chapter 41 of the Acts of 1907, two railroads, operated in connection with one another, under a lease of one by the other, or otherwise, constitute a single railroad.

32. Chapter 41 of the Acts of 1907 divides steam railroads into two classes for the purpose of passenger rate regulation, subjecting all railroads, as above defined, fifty miles long and over, to a limit of two cents per mile, in the case of adults, with trivial exceptions, and leaving all others subject to the former legislation, applicable to them at the date of the passage of said act.

33. The proviso in said Chapter 41 of the Acts of 1907, saying "Nothing in this act shall apply to any railroad in this state under fifty miles in length and not a part of, or under the control, management or operation of any other railroad, over fifty miles length, operating wholly or in part in the state", is construed as meaning the same as if it had said "Nothing in this act shall apply to any railroad in this state under fifty miles in length and not a part of, or under the control, management or operation of any other railroad, whose entire length is over fifty miles."

34. The words, "under the control, management or operation," are used in the appositive, not the alternative, sense, and mean the same as the words, "a part of".

35. A railroad owned, controlled or operated by another, but not connecting therewith, is not a part thereof.

36. In construing a statute, amending existing law by implication, such existing legislation is to be considered not only as an act *in pari materia*, but also as a live, operative and effective law, in so far as it is not repealed, determining, in part, the meaning of the new provision by its force and effect for both must stand and operate together as far as possible.

37. Legislative classification of railroads, according to the length of the line of the road, treating connecting roads, operated under one management, as a single road, for the purpose of rate regulation, is founded upon substantial differences, having direct and just relation to the purposes of the legislation, and is not in conflict with the clause of the Fourteenth Amendment to the Constitution of the United States, guaranteeing to all persons the equal protection of the laws, when the rates prescribed by it, apply a like to all roads of the same class.

38. Subjection of one class of railroads to an inflexible passenger rate, and another class to a variable one, based on annual gross earnings, does not work discrimination, invalidating the law under said constitutional amendment.

39. Failure to regulate charges of railroads under six miles in length and electric lines and street railways, otherwise than by the inhibition of unreasonable charges, does not invalidate railroad rate

legislation, applicable to steam railroads and unimpeachable upon any other ground.

40. Chapter 41 of the Acts of 1907 is, in all respects, valid on its face.

41. In respect to their operation in any particular case, railroad rate statutes are presumed to be valid, and the burden of showing the contrary is upon a railroad company asserting it.

42. Since a suit to have a statute declared confiscatory in its effect upon the complainant's business interferes with the operation of a legislative act, and all the facts, bearing upon the issue, are within the knowledge of the complainant, no bill for such purpose should be entertained nor any injunction awarded, except upon the showing of a strong and complete *prima facie* case.

44. Ordinarily, the right to the rate of returns, generally realized upon similar investment in the locality of the one under consideration in any given case, is deemed reasonable and fair and guaranteed to the investor, if he can earn it, and the rate is allowed upon the amount actually invested in good faith, fictitious valuations, indicated by over issues of stocks and bonds, not representing actual money, being rejected.

44. Under exceptional and peculiar circumstances, what would ordinarily be a reasonable rate of profit on the entire investment is disallowed, as being more than the service is worth to the public and therefore unjust to it.

45. A bill, filed by a railroad, charging an absolute loss on the transportation of passengers, occasioned by the operation of the statute, and less than a reasonable return for the entire service rendered by it, verified by an oath and accompanied by statements, showing in detail the gross income, expenses and net earnings, sworn to and sustaining the allegations of the bill proper, is sufficient as a bill to invalidate a rate regulating statute.

46. A statutory passenger rate, so low as to forbid the earning of reasonable compensation for carrying passengers, and thus contribute to insufficiency of net income on the entire traffic of the road to comply with the constitutional guarantee of right to a fair return on the investment, is confiscatory in its operation and effect upon such road and void.

47. That a new railroad was built without expectation of an immediate realization of a fair return on the investment is not a circumstance, justifying disallowance of such return, if it can be earned without exaction of unreasonable rates.

48. Earnings of a railroad company, applied to the purchase of

additional equipment, extension of its lines and other improvements, must be regarded as a part of its net earnings upon an inquiry as to whether a rate statute is confiscatory.

49. A decree, enjoining the enforcement of a rate statute as confiscatory, should contain a clause saving to the defendant the right to proceed at any time in the future, in any appropriate way, to obtain a vacation thereof, if, under altered conditions, it is no longer confiscatory.

BANK OF WILLIAMSON v. McDOWELL COUTY BANK.

Mingo County. Affirmed.

Poffenbarger, Judge.

SYLLABUS.

1. If the drawee of a forged check or bill of exchange pay it to a *bona fide* holder, who is without fault, he cannot recover the money from the person to whom payment was made.

2. In the absence of negligence or misconduct on the part of the holder of the forged paper, contributing to the fraud by which the person on whom it purports to be a check or acceptance is induced to part with money on the faith of it, such person must determine at his peril whether the signature is genuine.

3. The immunity so accorded the holder being an exception from the general rule of law, allowing recovery of money paid under a mutual mistake of fact, does not extend to one who has omitted some precautionary act or duty, usual and customary among bankers.

4. In taking a forged check from an unknown person, for collection, without inquiry as to his identity, and forwarding it for collection, after having taken the endorsement thereon of the reputed payee and placed its own unrestricted endorsement on the same, a bank omits a precautionary duty which the law merchant devolves upon it for the protection of the signature of the drawee, and makes a warrant of the genuineness of the signature of the payee, which it cannot afterwards deny; wherefore, it is liable to the drawee for the money paid on the check by the latter in ignorance of the forgery, unless the latter, by omitting some duty, resting upon it, is likewise in fault.

5. If, in such case, both parties have been guilty of negligence,

the drawee, in failing to have in its possession any means of testing the genuineness of the signature of the drawer, and the paying bank, in failing to have the payee identified, when he is unknown, the former cannot recover of the latter.

SCOTT & WOODRUFF v. HUGHES.

**Marshall County. Judgment Affirmed.
Brannon, Judge**

SYLLABUS.

1. If a vacation order by the judge does not show that a bill of exceptions was signed within thirty days after the close of the term at which judgment was rendered, the court will read the order of the circuit court showing the date of the close of the term.

2. Under the agreement involved in this case it was not the binding duty of Scott & Woodruff to remove liens, but Hughes had the right to do so, out of purchase money in his hands going to the landowners, if they would consent, and 'if they would not, then to remove the liens out of money in his hands going to the landowners and charge it to them, and Hughes failing to do so, and letting the options lapse from time, Hughes must answer to Scott & Woodruff for the amount stipulated to be paid them by Hughes.

3. The admission of improper evidence is not cause for reversal if it is immaterial in the decision of the case.

McSWEGIN v. HOWARD.

**Hancock County. Decree Affirmed.
Brannon, Judge**

SYLLABUS.

Decree of sale held not erroneous.

SMITH v. ATLAS POCAHONTAS COAL COMPANY.

McDowell County. Reversed.

Verdict set Aside, and new trial Awarded.

Miller, President.

SYLLABUS.

1. The allegation in a declaration on a contract to dig and mine coal, that defendant instructed, ordered and demanded plaintiff to cease, and stopped him from further mining and delivering said coal, sufficiently avers a breach of the contract by defendant, amounting to a renunciation and repudiation of the contract by him, excusing further performance thereof by plaintiff, and giving him right of action against defendant as for a breach thereof.

2. Where the evidence justifies it the trial court may properly instruct the jury, "that where one sues for the profits on a contract which he was prevented from fulfilling by the other party, without fault on his part, he is entitled to recover the full contract price less the expense of fulfilling the contract, "and" that the plaintiff in such case is not bound to prove what his profits would have been with absolute certainty, but only with such reasonable certainty as will satisfy a jury as to the reasonableness of his demand, and that remote and doubtful contingencies are insufficient to destroy the reasonable certainty of such demand."

3. In an action for damages for loss of profits due to a breach of contract by defendant, if sufficient facts and data be shown in evidence from which the jury may with reasonable certainty find substantial damages, the jury should not be limited by instructions to a finding of mere nominal damages.

4. If in such a suit the contract alleged and proven does not require that the work to be done by the plaintiff under the contract was to be done in any particular manner, an instruction telling the jury among other things that plaintiff must show "*how the work thereunder was to be done*, and unless the plaintiff has proven these things to your satisfaction by preponderance of the evidence you shall find for the defendant, "was erroneous, the words above italicized being calculated to mislead and deceive the jury, and should either have been modified or rejected.

5. A mere proposal by plaintiff amounting to a proposition of compromise of a claim for damages for breach of contract, unaccepted by defendant will not stop or bar him of his right of action against defendant.

SHURTLEFF v. RIGHT, ADMR, ET AL.

Barbour County. Affirmed.
Miller, President.

SYLLABUS.

1. A creditor may maintain a bill against an administrator and the widow and heirs of a decedent, for discovery of assets, settlement of the administration accounts, and in default of personal assets, to subject to the payment of his debt land conveyed by decedent in his life time to children, in consideration of love and affection, maintenance and support, and at the death of the surviving grantor to pay stipulated sums to other heirs.

2. Where such bill charges the making, execution and delivery by decedent to plaintiff of the note sued on, non-payment of this principal and interest thereof, and that the same remains wholly due and unpaid, the answer of defendants that said allegation may be true, though not admitted by them to be true, and that it may also be true as alleged that no part of said note or interest has been paid, but calling for full proof, does not within the meaning of section 2856, Code 1906, amount to a denial calling for further proof by plaintiff of the allegations of his bill.

3. Point 1 of the syllabus in Metz v. Patton, 63 W. Va. 439, re-affirmed.

GARRETT ET ALSH. v. SOUTH PENN OIL COMPANY.

Harrison County. Reversed, and new trial Awarded.
Miller, President.

SYLLABUS.

1. A deed granting and conveying to grantee one sixteenth of the oil and gas in and under a tract of land, contains this further provision: "The grant is subject nevertheless to any rights now existing to the lessee, by virtue of the lease heretofore given on said land for oil and gas; but if said lease has expired, or become void, or shall hereafter expire or become void, or if no such lease ever existed; said grantee shall have and is hereby granted, all the rights

and privileges of drilling and operating on said land, to produce, store and remove the said oil and gas necessary and usual granted to the lessee in an oil and gas lease." Construed, in connection with other provisions, to convey not only a one sixteenth of all the oil and gas, but, subject to the prior lease referred to, to be a lease of said land to guarantee for oil and gas purposes, with exclusive rights, reserving the usual royalty, and with covenants and agreements usually contained in an ordinary lease for oil and gas purposes.

2. Parol admission or declarations are not sufficient to divest legal title and interest in land.

3. The only equitable defense available in ejectment in this state are those prescribed by sections 3355 and 3366, Code 1906, in suits by vendor against vendee, or mortgagor against mortgagee, and upon notice served as prescribed by section 3357 of said Code.

4. Where a bill does not state a cause of action constituting a common basis upon which the rights of co-defendants depend, and prays for no relief in their behalf; and there have been no pleadings between co-defendants putting their rights in issue, and no decree adjudicating the same, a decree adjudicating the rights of plaintiff only, though the bill may disclaim any rights against one of said co-defendants, will not estop or bar another co-defendant in subsequent suit against the one in whose favor such disclaimer was made, involving rights not adjudicated by said decree.

5. Taking of a new lease for oil and gas by one of the two lessees in aprior deed or lease, granting to him without reservation or limitation the right and the exclusive right to enter and bore for oil and gas, is equivalent to a surrender and abandonment by him of all his rights and interest under the former lease; and his assignment of the new lease will invest in his assignee all his rights as lessee under either of said leases, and estop and bar him of all right of action as co-lessee in the first lease against his assignee, or any subsequent assignee of such new lease.

6. In an action of ejectment, in which plaintiff, to show right and title relies on an oil and gas lease, the surrender and abandonment thereof by him are available as defenses; and whether there has been such surrender or abandonment is a question of intention to be determined by the jury from all the acts and conduct of the parties in relation thereto, and which may be shown in evidence to the jury under the plea of not guilty.

7. The provision of section 3358, Code 1906, relating to ejectment, that if "the jury be of opinion for the plaintiff's or any of them the verdict shall be for the plaintiffs, or such of them as

appear to have right to the possession of the premises, or any part thereof, etc.," does not authorize such finding in favor of one of more of several joint plaintiffs, unless, as provided by section 3345, the declaration contains a separate count therefor.

KENNEDY v. HOLT.

**Taylor County. Writ of Prohibition Refused.
Brannon, Judge**

SYLLABUS.

1. A writ of prohibition does not lie against an execution for costs awarded by a circuit court on a motion to quash an execution, the circuit court having lawful jurisdiction of such motion.

2. Where the proceeding is of such nature as to forbid a writ of prohibition when the amount is over \$100, the fact that it is less in amount will not give prohibition in a proceeding of like nature.

Robinson, President. Absent:

ARMSTRONG, ET AL. v. MARYLAND COAL CO., ET ALS.

**Taylor Couty. Modified and Affirmed.
Miller, Judge.**

SYLLABUS.

1. As an exception to the general rule, a contract for the sale of land, signed by the vendee only, may in a proper case be specifically enforced at the suit of the vendor.

2. If an agent be authorized to sell land it is not necessary that his authority to sell be in writing.

3. If the principal in ratifying and approving a contract by his agent, for the sale and purchase of a certain vein of stratum of coal and mining rights, modify the terms thereof, and with knowledge thereof, the vendee finally accepts the contract without objection

thereto he will be regarded as having acceded to the modification and will be bound by the contract as modified.

4. An option contract for the sale and purchase of a certain vein of stratum of coal and mining rights, calling for final acceptance by a day specified, gave the vendee the right thereafter to arbitrarily object to the quality of the coal, the character or location of the surface, or to any title or conveyance, or the terms of mining rights, and if the vendors were unable or unwilling to remove the same, the right to either party to rescind the sale: Held, that after such final acceptance by the vendee, investigation of the coal, coal beds, surface and mining rights, and final election to take the property agreeably to the terms of the contract, and calling for abstract of title, deed, etc., the vendee thereby waived the right to interpose any such arbitrary objections, and that upon tender of abstracts of title and deed giving good title and reasonable and adequate mining rights, the vendor was entitled to specific execution of the contract.

5. When at the time of the contract for the sale and purchase of land the purchaser has knowledge of the location of the title, and that the vendor is not the owner, but represents the owner as agent, and depends for performance of the contract on procuring the deed, the ratification and approval of the owners; and with the further knowledge that the vendor has procured such ratification, and that he and his principals are proceeding in good faith in the performance of the contract, there is no such lack of mutuality of contract as will excuse specific performance thereof by the vendee.

6. When the vendee in such an option for the sale and purchase of coal and mining rights, after investigation of the character of the coal and mining rights as contemplated by the contract, notified the vendor in writing of his final election to take the property, waiving thereby the right to make such arbitrary objections thereto, and the right to rescind and cancel the contract, specific execution of the contract by him may be decreed, if the vendor, at the time when by the contract or the equity of the case he is required to do so, is able to convey a good title to the coal, and tenders a deed, granting the same and at least reasonable and adequate mining rights specific performance of the contract will be decreed, though the mining rights owned and appertaining to the coal under such tract described be not in all respects uniform.

7. Where under such a contract the purchaser with knowledge of the character of the mining right which the vendor owns and is able to convey finally elects to take the property, and said mining rights are reasonably adequate for the purposes of mining and remov-

ing the coal conveyed, and from co-terminious tracts, the purchaser may not as a condition precedent to the execution of the contract, demand as mining rights the right to remove over, through and under the lands in which the coal conveyed is situated coal thereafter acquired by the purchaser, the right to make and maintain all necessary and desirable dumps, air-ways, haulage-ways, and drain-ways through and upon the surface of the land *and every part thereof*; a covenant against liability for subsidence, or injuries occasioned by mining, removing, coking, manufacturing or carrying away the coal or products thereof; the grant of a perpetual easement of support and maintenance of support of the coal vein or stratum conveyed in its then natural condition or position; a covenant that in mining for oil or gas, wells shall not be drilled except through the solid coal conveyed, and upon condition that the purchaser, his heirs or assigns, shall be first paid a fair price for the coal, not less than one hundred feet square necessary to protect each well, the law of the contract giving and protecting the purchaser in all such rights which under the contract he is entitled to demand.

8. A mere incumbrance on real estate which may readily be removed and discharged out of the purchase money is not a bar to specific execution of a contract for the sale and conveyance thereof.

9. If a vender is able to make the stipulated title at the time when by the terms of his contract, or by the equities of the particular case, he is required to make conveyance, in order to entitle himself to the consideration, this is sufficient to entitle him to specific execution, though he may not have been in a situation to perform the contract literally at the time he brought his suit.

10. Though in a suit for specific performance, the general rule is that if there be doubt as to the title, or defendant request it, the court should order a title reference, nevertheless if the parties have taken all their evidence and submitted the cause to the court for final adjudication, without motion or request for such reference until after the court has pronounced its decision, and the facts proven are sufficient to show *prima facie* a good title in the plaintiff, the decree below will not be reversed here for alleged error in overruling defendant's motion for such title reference, the motion being then too late.

11. Exceptions to depositions recorded by the officer taking the same will, as a general rule, be regarded as waived, unless brought to the attention of the court at the hearing and the ruling of the court obtained thereon, and unless the evidence excepted to be wholly incompetent it may be given such probative effect as without such objections it may be legally entitled to have.

12. Where by the terms of a contract for the sale and purchase of a certain vein or stratum of coal, and mining rights, the purchaser is not let into possession of the property, except to make preliminary investigations and tests, and is not authorized to mine or operate the property except upon compliance with all the terms of the contract, by paying the purchase money and obtaining a deed, and by the terms of the contract the purchase money is payable only upon a tender of the deed, the purchaser is not in a suit against him for specific performance chargeable with interest on the principal of the purchase money except from the time of the tender of a proper deed for the property.

CONNOLLY v. BOLLINGER.

Ritchie County. Affirmed.
Poffenbarger, Judge.

SYLLABUS.

1. In a count on a promise to marry generally in a declaration in assumpsit for breach of the contract, the dates of the promise and request for performance need not be so stated as to show the lapse of a reasonable time between them for performance. Being immaterial and merely formal, the dates may be laid under a *videlicet*, and the proof may vary therefrom.

2. An incomplete instruction, correct as far as it deals with its subject matter, is perfected by the giving of another for either party, supplying the omitted matter.

3. Indefinite and indirect conversation between the plaintiff and defendant in an action for breach of a promise of marriage, capable of being interpreted as relating to marriage and aided by a course of conduct, indicative of betrothal, is sufficient to sustain a finding of the marriage contract, without proof of an express or formal engagement.

4. Proof of indulgence, by the parties to a contract of marriage, in illicit sexual intercourse at the time and place of the making of the promise, does not, as matter of law, preclude a verdict in an action for breach of the contract.

5. Though a promise of marriage, made in consideration of the allowance of illicit sexual intercourse, is void for illegality and immorality of the consideration, what the consideration was is a question for

the jury, when the evidence concerning it is inconclusive, but tends to prove mutual promises to marry, as well as immoral conduct at or about the same time.

6. Renunciation of a contract of marriage alters the status of the parties *ipso facto* and a right of action accrues at once.

7. After the injured party in such case has signified intention to treat the contract as terminated, except for the purposes of an action for damages for the breach thereof, by the institution of such an action, a subsequent offer of performance by the other party does not bar recovery.

THE WEST VIRGINIA TIMBER CO. v. FERRELL ET AL.

Logan County. Reversed; Judgment Entered for Plaintiff.
Williams, Judge.

SYLLABUS.

1. If the verdict be for plaintiff in an action of detinue, the description of the property must be such as to make it capable of being identified.

2. When the verdict is for plaintiff, and describes the property not otherwise than "the property described in his declaration," and the declaration sufficiently describes it, this will supply the lack of description in the verdict and render it valid.

3. W. is the owner of certain personal property in the possession of F. who, claiming to own it, delivers it to P. and pledges it to him to secure a debt owing by F. to P.

Held: F. and P. may be sued jointly to detinue by W.

Robinson, President, Absent.

KUNST v. CITY OF GRAFTON.

Taylor County. Reversed, and New Trial Awarded.
Miller, Judge.

SYLLABUS.

1. Where in constructing a new street a municipal corporation collects the surface water in holes left in the street opposite an abutt-

ing lot, and because of the soft and porous condition of the soil the water so collected is caused to flow in and under the same, causing the soil thereof to slip and to destroy the buildings thereon, such municipal corporation is liable in damages to the owner of such lot for the consequential injuries sustained, as for collecting such surface waters in drains or gutters and casting them in a body thereon.

2. If in so constructing and grading one of its streets on a hillside, a municipal corporation build an embankment in front of an abutting lot and thereby increases the lateral pressure thereon, which, combined with the increased flow of the surface water, caused by such street improvement, or by the water collected in holes or in drains or gutters and cast in a body on such lot, causes such lot to slip and to destroy the buildings thereon, such corporation is liable in damages to such lot owner for the consequential injuries to his property.

3. An instruction to the jury, covering a case not presented by the pleadings, though there be evidence on the subject covered thereby, is erroneous, and unless it clearly appears that the rights of the party complaining have not been injuriously elected thereby, the giving of such an instruction will constitute reversible error.

4. Though opinion evidence as a general rule is not admissible, still when the facts are such, that it is manifestly impossible to present them to the jury with the same force and clearness as they appeared to the observer, then opinion is admissible as to the conclusions and inferences to be drawn therefrom.

MATE CREEK COAL COMPANY v. TODD, ET ALS.

Mingo County. Affirmed.
Williams, Judge.

SYLLABUS.

1. This court will not reverse the judgment of the trial court for refusing to grant a continuance to one of the parties on account of the absence of a material witness when it appears from the record that such witness is a non-resident of the state, and the party desiring his testimony could have taken his deposition before the trial.

2. When certain instructions are given which correctly propound the law applicable to the state of facts developed by the evidence in the trial of a case, it is not error to refuse other instructions which state the same law in a different form.

3. It is not error to refuse an instruction which does not rest upon some material fact which is either admitted, or supported by some appreciable evidence.

MATHENY v. FARLEY, ET ALS.

Raleigh County. Affirmed.
Miller, Judge.

SYLLABUS.

1. An attorney retained generally to conduct a legal proceeding, is presumed, in the absence of anything to indicate a contrary intent, to enter into an entire contract to conduct the proceeding to its termination, and he cannot lawfully abandon the service, before such termination, without justifiable cause; but if he have sufficient cause therefore he may do so, and may recover what his services already rendered are reasonably worth.

2. A case in which the facts proven were held to justify abandonment by an attorney of the case in which he had been employed, and to support the verdict and judgment in his favor for services already rendered.

SHRIVER v. COUNTY COURT OF MARION COUNTY.

Marion County. Affirmed.
Poffenbarger, Judge.

SYLLABUS.

1. If a traveler upon a highway, in attempting to pass over a defect therein, open and apparent and of which he had full knowledge, is thereby injured, and there was no necessity for his endeavor to pass over it, he is deemed in law to have assumed the risk incident to the attempt, and denied compensation for the injury on the ground of contributory negligence.

2. That it is not negligence *per se* to use a highway, known to be in bad condition, does not imply right in a traveler to compensation

for injuries, recklessly incurred, nor freedom from duty to suffer reasonable abatement of strict legal rights in respect to highways and take reasonable measures for his safety, even to the extent of some delay and effort to avoid injury.

3. On the appearance of a clear case of contributory negligence, the trial court should take the case from the jury, upon a proper demand for such action.

4. A traveler, having two reasonably convenient ways for his journey, one of which is dangerous and the other not, assumes the risk of injury, if he uses the dangerous way, and cannot recover for any injury he may thereby sustain.

THE BILLMYER LUMBER COMPANY v. MERCHANTS COAL COMPANY OF WEST VIRGINIA.

**Preston County. Decree Modified and Affirmed.
Poffenbarger, Judge.**

SYLLABUS.

1. The assumption by one corporation of all the indebtedness of another of whatsoever kind and its agreement to pay and discharge the same, when due, as the consideration for the conveyance to it of all the property of another corporation, bind the former to pay all the liabilities of the latter, though some of them, such as demands for unliquidated damages, may not be debts in the technical sense of the term.

2. When property has been conveyed in consideration of the assumption, by the grantee, of all the indebtedness of the grantor, any creditor of the latter may charge the property in the hands of the grantee with his debt and subject the same to payment thereof.

3. The statutory provisions of this state, modifying the rule of comity and limiting the powers and capacities of foreign corporations in this jurisdiction, do not affect their rights to sue and make defense in actions of suits in the courts of this state, pertaining to contracts validly made.

4. The loss by a foreign corporation of its previously acquired right to do business in this state does not affect its capacity to sue or be sued in respect to a contract made, or right vested, when it was lawfully doing business in the state.

5. If, after an action at law against a foreign corporation, rightfully doing business in the state, has been properly commenced, such corporation be deprived of its statutory privileges, the action may be prosecuted to judgment as effectually in all respects as if the defendant's right to do business in the state had not ceased.

6. In such case, the judgment is binding on a third party who, before rendition thereof, assumed the payment of the debt or liability involved in the action.

7. The provisions of chapter 53 of the Code, making the assets of expired, dissolved and insolvent corporations trust funds for the benefit of their creditors and stockholders, and authorizing suits in equity by creditors to wind them up, are not exclusive remedies and do not, of themselves, take away the right to proceed to judgment and execution.

8. In a suit in equity to charge a debt upon property, encumbered by mortgages to secure large issues of bonds, in which the trustees are clothed with ample powers to protect and enforce the rights of the holders of the bonds, it is unnecessary to make the bond holders parties, since the trustees, being parties, fully represent them.

9. A bill in equity against a non-resident, as to whom no process other than an order of publication, duly published and posted, has been taken, cannot be taken for confessed as to such party; but, if the decree, erroneous in that respect, gives no relief against such party, it will be corrected without reversal, when in the appellate court for review no other grounds and is not otherwise erroneous.

BELL v. TORMEY.

**Kanawha County. Order Reversed.
Brannon, Judge**

SYLLABUS.

1. Under Code 1906, Ch. 125, Sec. 46, the defendant not appearing, the plaintiff may obtain judgment either by filing the affidavit therein prescribed, or by proving his case, without such affidavit.

2. After judgment by default has been entered under Code 1906, Ch. 125, Sec. 46, it cannot be set aside, and a defense allowed, under Sec. 47, without good cause shown.

CARPENTER v. HYMAN.

**Cabell County. Reversed; verdict set aside; new trial awarded.
Robinson, President.**

SYLLABUS.

1. The fact that one is prejudiced against the business of selling intoxicating liquors does not render him incompetent as a juror on the trial of an action for damages arising under the liquor law, if he has no prejudice against the party engaged in that business from whom the damages are claimed.

2. A litigant has the right to ascertain the fitness of the jurors called, by an examination within the scope of that provided by Code 1906, Ch. 116, Sec. 17; but the trial court, in the exercise of a sound discretion, may properly limit the extent of the examination in relation to any of the qualifications contemplated by that statute.

3. An instruction based upon undisputed facts in evidence is not erroneous merely because it fails to submit those facts with the qualification "if the jury believe from the evidence."

4. If a mother has been injured in her means of support by the intoxication of her minor son, she has a right of action against one who unlawfully sold him the liquors which caused in whole or in part the intoxication, although at the time of such injury she was living with the husband and father on whom she depended partly for support.

MAXWELL v. MAXWELL.

**Ohio County. Affirmed.
Robinson, President.**

SYLLABUS.

The circuit court has jurisdiction to award suit money and maintenance necessitated by the pendency of an appeal of a divorce suit. The power to make such an award does not lie in the appellate court.

KAUFMAN v. MASTIN.**Mercer County. Affirmed.****Robinson, Judge.**

1. Whenever the judgment, if left unreversed, will preclude the party against whom it stands as to a fact vital to his rights, though the judgment if affirmed may not be directly enforceable by reason of lapse of time or change of circumstances pending appeal, a writ of error will not be dismissed as involving only a moot case.

2. A tenant's holding over and paying monthly rent beyond the term of a lease for a year, relating to urban premises, in which lease rent is reserved by the month and is payable at monthly periods, does not, alone, imply a renewal by the year. A renewal of the tenancy by the month is thereby implied.

NEWTON v. KEMPER, ET AL.**Mason County. Modified, and Affirmed.****Miller, President.****SYLLABUS.**

1. While a court of equity will, in a proper case, sometimes give relief against, it will never lend its aid in the enforcement of a forfeiture.

2. While there is great liberality in courts of equity in permitting amendments, the practice will not justify the amendment of a bill so as to substitute for the original an entirely new cause of action wholly disconnected with the former.

3. Where a court of equity has not jurisdiction to decree relief, it is error to dismiss a bill without inserting in its decree a clause saving the plaintiff, and if need be the defendant, the right to prosecute or defend any other proper suit or suits in respect to the matter complained of in bill or answer, or showing that the cause has not been decided on its merits; as such decree, without such saving clause, would be a bar to any subsequent suit predicated on the same facts.

4. Where plaintiff in such case superinduces the error, and

is at fault in not asking the court, at the time of the decree, to dismiss the bill without prejudice, the decree will be modified and affirmed here, but costs will be adjudged against him.

PRICHARD & CO. v. MCGRAW OIL & GAS CO., ET AL.

Taylor County. Affirmed.
Williams, Judge.

SYLLABUS.

Service of a summons returnable to a day which happens to be a legal holiday, may be made on the next succeeding secular day.

JONES ET AL. v. CRIM & PECK, EXRS., ET ALS.

Barbour County. Reversed and Remanded.
Williams, Judge.

SYLLABUS.

1. Equity regards the substance and not the mere form of pleadings, and a pleading although styled a petition, and filed for the purpose of reviewing the proceedings in a former suit, will, nevertheless, be treated as an original bill, if the matter averred is sufficient ground for an original suit.

2. If a bill shows upon its face the want of proper parties, it is demurrable.

3. In order that substituted service of original process shall have the effect of actual service upon the party in person, the return must show that all essential provisions of the statute authorizing such substituted service have been strictly complied with. the return must show that all essential provisions of the statute

4. A default decree rendered upon a defective substituted service of process is void for want of jurisdiction.

5. The recital in a decree to the effect that process was duly served upon defendant is not conclusive evidence of proper service, but must be considered as referring to the manner of service shown by the return on the process, which if plainly contradictory, will prevail over the recital.

6. Absence from the record of the return on the process showing the manner of service upon other defendants embraced

in the recital in the decree along with the defendant upon whom imperfect service is shown to have been made by a particular return as to him, raises no presumption that such defendant was afterwards properly served.

CHAPMAN v. PARSONS, JUDGE.

**In Prohibition. Writ Awarded.
Robinson, Judge.**

SYLLABUS.

1. In no suit but one seeking a divorce of some character is there jurisdiction to award alimony pendente lite.

2. Alimony is only cognizable as between parties united by a marital relation that imposes upon the husband the legal duty to support the wife.

3. A decree of divorce from bed and board without alimony dissolves the relation of husband and wife so far as the duty of the former to maintain the latter is concerned.

4. Where there is admittedly no relation that legally imposes the duty of the wife's maintenance on the husband, the law gives no power to make him maintain her.

5. There is no jurisdiction to award alimony as between parties divorced from bed and board, as incident to the pendency of an independent suit to set aside the decree of divorce for fraud, and before the decree is successfully assailed.

WIGGIN v. DILLON.

**Raleigh County. Reversed and Judgment Entered.
Robinson, Judge.**

A verdict clearly supported by law and the evidence should not be disturbed because an erroneous instruction was before the jury.

McCLAUGHERTY v. WATER COMPANY.

Mandamus Refused.

Brannon, Judge

SYLLABUS.

1. A resident of a city may, in his own name, maintain mandamus against an incorporated water company to compel it to furnish him water as required by its franchise from the city to construct and operate its works in the city.

2. A rule of a water corporation requiring a consumer of water to repair service pipes leading from its main pipe in a street to the property of the consumer, assented to by him, and made a part of the contract between him and the corporation, is valid.

BUTCHER, ET AL. v. SOMMERVILLE, ET AL.

Harrison County. Affirmed.

Miller, Judge.

SYLLABUS.

1. In an action involving title to land by inheritance, letters of deceased persons showing family conduct, and containing tacit recognitions and declarations of relationship are admissible as such on the question of pedigree.

2. Although an instruction to the jury requested by plaintiff states a correct proposition of law, applicable to the evidence, its rejection will not be good ground for reversal, where the court has on motion of defendant, and upon the whole of the evidence rightfully instructed the jury that the evidence does not warrant a verdict for plaintiff and to find for the defendant. In such case the question of law propounded by plaintiff's instruction rejected becomes involved in and fairly presented by the instruction given to find for the defendant.

3. Where the evidence given at the trial, with all inferences the jury could justifiably draw from it, is insufficient to support the verdict for the plaintiff, so that such verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for defendant.

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FOURTH EDITION 1910

MAY, 1910

THE



BAR

All over the country, from president to poundmaster, the question is asking. "What is the matter with the law?" And bar associations and legislative bodies everywhere are endeavoring to meet the difficulty, which all acknowledge exists, by means of remedial legislation; and such legislation is enacted, and, being tried, seems to fail of its purpose, and such legislation will be enacted, and will continue to fail of its purpose, because it does not touch the root of the difficulty. For the greatest trouble with the law today, and the chief obstacle in the way of its due administration, is the lawyer himself; and much of the apparent necessity for amending the law could be permanently obviated by the more effective method, as yet apparently untried, of amending the lawyer.—Judge Dooling in *The Docket*.

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The Bar

VOL. XVII

MAY, 1910

No. 45

THE BAR

Official Journal of the
WEST VIRGINIA BAR ASSOCIATION

Under the Editorial Charge of the
Executive Council.

Published Monthly from October
to May. Bi-Monthly from June
to September.

Entered as second class matter
August 11, 1904, Postoffice, Mor-
gantown, W. Va., under the Act
of Congress, March 3rd, 1879.

Price, per copy.....\$.10
Yearly, in advance..... 1.00

Advertising Rates on Request.

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The Annual Meeting

Among the good things, not already announced, that are being provided for the coming annual meeting of the State Bar Association, is a paper by Judge George W. Atkinson, on the history, organization and jurisdiction of the United States Court of Claims, of which he is a member.

It is unnecessary for us to tell the readers of THE BAR anything about Judge Atkinson, of Washington and West Virginia—especially of West Virginia. For he has not relinquished his hold on West Virginia by doing business in the National Capital, or by any other process of elimination. His domicile is still here, his heart is here, the friends and associates of his life are here, most of his life work and history are here, and the warmest interests of his life will always be here. He is one of us.

It goes without saying that he will contribute much to the occasion both by his paper and his presence.

Other features of the program have heretofore been announced. We append the program herewith, as it has been developed up to date. This is its tentative form now and may have to undergo some revision and excision between this and the date of the meeting.

Members of the Association will not forget that the meeting this year is at White Sulphur Springs, one of the historic spots of West Virginia, rendered almost audible with the associations of several generations, and having a social atmosphere, even yet, that is, more than almost any other resort, expressive of the old time Southern hospitality and good fellowship.

Outside of the interests that attach to the meeting of the Bar Association, it ought to make a delightful outing for the season at which it is appointed—in July. We anticipate that there are many of our members who will want to make acquaintance with this resort; many more that want to renew their acquaintance; and that the occasion will draw a large attendance and prove a very profitable and enjoyable meeting.

Program of twenty-sixth annual meeting of West Virginia Bar Association, White Sulphur Springs, West Virginia, July 14 and 15, 1910.

First Day.

Beginning at 10 o'clock, a. m.

Address of President Haymond—"Our Laws of Eminent Domain."

Report of Committee on Admissions.

Election of Members

Appointment of Committees on Nominations.

Report of Secretary

Report of Treasurer.

Afternoon Session.

Report of Executive Council.

Paper—"Our Law of Administration"—Thos. H. Cornett.

Election of Officers, Members of Executive Council and

Selection of Time and Place for next annual meeting.

Delegates to American Bar Association.

Report of Committee on Judicial Administration and Legal Reform.

Evening Session.

Address—Subject not yet announced.—Chas E. Nagle, Secretary of Commerce and Labor.

Second Day—Morning Session.

Report of Committee on Grievances.

Report of Committee on Legal Education.

Paper—"Should West Virginia Have a Workmen's Compensation Law."—Luther C. Anderson.

Discussion.

Report of Committee on Legal Biography.

Report of Committee on Banquet.

Afternoon Session.

Address—"The U. S. Court of Claims."—Judge G. W. Atkinson.

Report of Committee on Legislation.

Report of Auditing Committee.

Report of Miscellaneous Business.

Appointment of Standing Committees.

Topics for General Discussion.

EVENING—BANQUET.

A Great Man Has Fallen

We believe the death of Justice Brewer has deprived the U. S. Supreme Bench of a member who was of more value to that court, to the country, and to the profession, than if it had fallen upon any other member of that able body.

It may not be that he was a more profound lawyer than others of that court, but in addition to being a lawyer he was a man—a fellow being with the human race; with all the soulful sympathies, affections and humanities of a man. Devotion to his profession did not narrow him, or dwarf his heart, or divorce him from the common interests and aspirations of his fellow men. He kept in touch with all lines of activity, and was a wise observer and safe counsellor upon the great and varied problems of government and political economy that engage the attention of the Nation. His heart was right, and his head was generally right in dealing with any subject, whether it was a great problem of law, of government, of business, of morals, or of society.

Thus he honored his profession and his race and his country, by presenting an example of the full measure of a man in the highest and most responsible office of the Nation. The example and influence of his life are grand inspirations. The country would be fortunate were there more like him.

Hon. James M. Mason's Analysis of the Debt Report

On another page we publish an analysis of Commissioner Littlefield's report on the state debt, made by Hon. James M. Mason, of Charles Town.

If there is one man in the state more familiar with this whole matter of controversy than Mr. Mason, we hope he will stand up and be counted, for he would be a curiosity.

Mr. Mason grew up with it and has lived with it throughout its history. We believe he originally represented the holders of the "West Virginia Certificates" who were trying to get their money out of this state or some other source.

Mr. Mason has always been frank and honest enough to express a belief that there is something due from this state to the mother state. And he has been like a sentinel crying aloud from his watch tower, ever since this suit was instituted, a warning to West Virginia, that the judgment against her would be big.

We seem to be on the eve of realizing the truth of his prophecy. His analysis of the commissioner's report, so far as in his Judgment the court will follow it, foreshadows a decree in favor of Virginia of \$11,000,000 in round numbers, exclusive of interest, or about \$18,000,000, if the interest charges are allowed.

This was about the first estimate made by those who examined the report in the first instance. The counsel for West Virginia have been optimistic enough to shave this down some millions, but it is a guess in each instance as to what the court will do.

When the court had gone far enough into the case to grant an order of reference to a commissioner to make up an account between the two states, it had virtually decided that if the accounting showed West Virginia in debt, that amount would be so decreed.

All preliminary questions seemed to have been decided in the mind of the court. And yet these collateral questions seem to us to be deserving of more consideration with the court than the simple one of whether a balance could be shown on one side or the other in an accounting.

Is it within the measure of judicial charity—if we may so term it—for this great tribunal to entertain a suitor who comes into the court with the purpose, the attitude and the history which Virginia has made for herself in this case?

It is not the case of one state suing another, as has been true of all other cases of a similar character which are cited as precedents. In all previous cases that appear to be similar a state has been the bona fide holder of the debt which constituted the basis of the suit. In this case the plaintiff, Virginia, does not claim to be. She is suing for the use of some individual speculators who have in their possession some spurious certificates which Virginia issued without authority or legal right in the name of West Virginia.

She enters this suit under a contract with these speculators that they will accept the result of the suit as final, win or lose, pay the cost and release Virginia from all further claim of indebtedness.

As for anything beyond or outside of these spurious certificates, Virginia had never hoped or attempted to recover anything from West Virginia, and she has persistently declined for forty years to make any other claim, enter suit, or even to go into a friendly settlement. She got what she thought was the value of these certificates from her creditors when she issued them, and put the proceeds in her treasury or made them a set-off against money thereby retained in her treasury; and she has remained content with the situation for forty odd years. Now at the instance, and at the cost, and for the exclusive use of these speculators, she institutes this suit and wants to drag and is dragging West Virginia through the musty, obbscure and uncertain records of nearly a half century upon which to found an indebtedness.

If this was the character of a suit between individuals in any court of equity in the land, it would be thrown out by the cuff of the neck.

The whole aim, attitude and antecedents of the plaintiff are unconscionable and unspeakable.

On the other hand the attitude of West Virginia from the beginning has been that of an honorable debtor, who only wanted to be assured of what her obligations were, and she was ready to meet them.

It is not within the spirit or purpose of our people to repudiate an honest debt. We believe they are incapable of this. Yet on the other hand, having studied this question for half a century there has been a very general and positive settling down to the conclusion that we owe the mother state nothing either in law or equity.

The New Circuit Judge

The bill for the appointment of an additional judge for the Fourth Circuit, has already passed the Senate, and is quite certain to pass the House.

It is also quite certain that the additional judge will be promptly appointed following the passage of the bill.

It seems to be equally certain that the new appointee will not be taken from West Virginia territory. This latter conclusion is based on information coming from headquarters; and the conclusion itself is based on the fact that Judge Goff is on the bench, and is a West Virginian. The belief is that a Virginia man will get the place.

Now if they don't legislate all the circuit judges out of existence, as they probably will, the new appointee may get a chance to take his seat and say he was once circuit judge.

No Crime to Burn a Wife's House

In the last number of THE BAR we published a communication from the prosecuting attorney of Tucker county, calling attention to a decision by Judge McWhorter of that circuit, to the effect that a husband could not be convicted of arson under our statute for burning a dwelling house occupied by himself and wife, which was the wife's separate property; and suggesting the importance of legislative action in the premises.

While very confident that Judge McWhorter was able to fortify his position with good reason and authority, we were interested to know the exact ground upon which he based it, and re-

quested him to give it to the bar of the state as a matter of general interest.

Judge McWhorter's answer to our inquiry is published on another page of this journal, and while it is plausible and buttressed with good authority, we believe it will provoke some dissent from the bar of the state and we would like to hear from any one who feels like discussing it.

We feel like saying simply that this construction or interpretation of the statute would never have been conceived or regarded as tenable but for the common law nonentity conception of the wife, and is out of harmony with and subversive of both the letter and spirit of modern legislation and the modern attitude toward the wife. Our civilization has been completely emancipated and divorced from these barbarisms of the common law, even if some of the text writers and commentators on the law have not been.

The identity of the wife is no longer so merged with the husband as to be obliterated and lost. Her rights of property, and her property itself, are just as distinct and under her individual control as those of her husband.

Our Supreme Court has said: "A wife, as to her separate estate, is a stranger to her husband—a wholly distinct person. Our statute giving her capacity to take and hold property as her separate estate as if she were a single woman, has as to such property dissolved the unity of person of man and wife, which existed at the common law." 32 W. Va., page 314.

Therefore, when a husband burns his wife's "dwelling," which happens to be her own house—he does more than destroy her dwelling; he sends the money value of her property up in smoke; he deprives her not only of her dwelling, but of her house—and they are not one and the same thing by any means. The dwelling of the husband and wife may be the same—the possession may be a common one, but the title to the house, as far as the husband is concerned, is in "another," and when he burns that dwelling-house, he burns the dwelling house of "another."

We think Judge McWhorter's position faulty in holding

that only the possessory right is involved and covered by the statute. If, for example, the wife were keeping a boarder in the same house, and the husband had set it on fire, he could be convicted under our statute of burning the dwelling of another—the dwelling of the boarder—because, says Judge McWhorter, “it is not the legal title, but the possessory right that is involved.” But he could not be convicted if only he and his wife occupied the dwelling—because she is not “another,” although she is dwelling there and owns the property.

To our mind this is purely a common law conception of the entity or non-entity of the wife. It is the object of the modern statute to make the house the subject of the protection of the law, and “dwelling” is only descriptive of the character of the house. If the “dwelling” were only a tent, its burning would not come within the scope of the statute—it must be a house, and the house of “another,” although both husband and wife may occupy it.

It would be just as reasonable to hold that if a man set fire to a court house he would not be amenable to arson for burning the house unless the possession of the court room was destroyed; or for burning a school house unless its use and occupation for school purposes were destroyed. In other words, that the crime pertained to the use of the thing rather than to the thing itself.

We do not understand Judge McWhorter to say that his personal judgment endorses this position; but rather that his position was based upon authority from which he was not inclined to dissent. We honor him for his respect for the law as he finds it, and it may be that legislation is necessary in the matter, but it strikes us that the very spirit and letter of our statutes are at war with this construction.

“One of the writers of the Bible (I think it was King Solomon) said, ‘The borrower is servant to the lender.’ We all know that the time to make a deal with a man you are lending money to is the time you are giving him the money, or, perhaps, a little before.” *Per* Audenreid, J., instructing a jury, in *Heist v. Blaisdell*, (Pa.) Atl. Rep. 259.

High Graft

The country received the statement of a distinguished U. S. Senator, recently, with some surprise, and may be some allowance for oratorical license, to the effect that there was about a three million bill of "graft" hid away annually in the processes of administration of the National government for which the government received no proper return.

He did not use the word "graft," but subsequent disclosures along this line, justify the use of that term, even if it was not meant; and justify also the estimate he put upon the amount of the bill as conservative.

As a single instance of what might be termed "graft," pure and simple, a contemporary gives the following facts and figures connected with superfluous customs and pension agencies that are being maintained here and there over the country, that are of no practical use or benefit to anybody except to afford patronage for congressmen, and salaries for idle incumbents.

To select a few cases out of many, six such ports are: Saco, Maine; St. Mary's, Georgia; York, Maine; Natchez, Mississippi; Alexandria, Virginia, and Annapolis, Maryland. At Saco the aggregate receipts for the past fiscal year amounted to the magnificent sum of \$15. The expenses of collection were no less than \$662; the result, a cost of over \$41 to collect \$1. At St. Mary's, with the same remarkable record of receipts, the expenses of collection were actually greater. Result, a cost of over \$45 to collect \$1. At York, Maine, the receipts were only half as much, yet so large were the expenses that it cost \$50 to collect \$1. At Natchez, with receipts of \$11, it cost \$52 to collect \$1. More astounding still is the record at Alexandria, where the receipts were \$10 and the cost of collection \$122 for \$1. One catches one's breath, however, in contemplating what Annapolis did. The receipts there last year were the lowest of any port in the United States. The receipts were \$2.09, and the cost to collect was \$309!

If this is not "graft," it is because the term does not com-

vey a sufficient measure of political and public iniquity—probably “robbery” would be more applicable.

When this bill of a \$3,000,000 graft is itemized there may be, and doubtless are, other items that will be more startling.

The Only Thing The Legislator Does Not Tackle

There ought to be statesmanship enough in this country to settle a ‘strike,’ as all other things are settled—by law.

There is always ready legislation enough to make everything else toe the line. But a strike is as near a picture of anarchy as anybody could wish to see.

Why can't we have law, if not to prevent a strike, to regulate it, if it must be?

If the strikers were the only sufferers by a strike, we might consistently let them play the game of Kilkenny cats to the logical end.

But the whole population must share in the calamity—evidently and seriously so, if it involves a public utility.

Has not the public a right to be protected against the strike that interferes with a public utility?

Ought it not to be a crime or misdemeanor in law to interfere with a public utility by a strike?

Take for illustration the business of railroad transportation. That is a semi-public institution, and indispensable to the public welfare.

Has any religious organization, or political organization, or business organization, or social organization, the right or the temerity, or the impudence to tie up a public railroad for its own selfish ends?

Would we not build more jails if necessary, to jing every member of any such organization who would do such a thing?

But when it comes to a labor organization, law and order takes in its sign, and it's a free-for-all contest, and the devil take the hindmost.

A respected contemporary, *The Outlook*, makes some practical suggestions on this line that are worthy of consideration :

“The railway corporation has been created by the public to serve the public interests; and the public have some rights which the corporation and employees are bound to respect.

How shall they be protected?

There are three rights which are imperiled by labor wars, and which the law should safeguard :

The right of the public to unimpeded transportation.

The right of the corporation to carry on that transportation for the public.

And the right of the employees to fair treatment from their corporate employer.

Protect the last and the rest will be easily protected.

“The law should allow the employees of any public service corporation to present their grievance to a public service commission or its equivalent; should direct the commission to give an immediate and public hearing; should require the railway to accept and act on the finding of the commission; and on its refusal or failure so to do, should put the railway into the hands of a receiver, as it does in case of a failure to pay interest on its bonds. This would provide the employees with a remedy for real or fancied wrongs.

It should then make it a penal offense for the employees of any public service corporation to combine in any attempt to interfere with the regular work of the public service corporation, whether by leaving in a body or any other method. And it should make it a misdemeanor for any individual to leave the service without adequate previous notice, say four weeks, the misdemeanor being punishable by fine or imprisonment or both. This would protect the right of the public service corporation to render, unhampered by strikes, the service to the public which it was created by the public to render.

These two rights protected, the right of the public to the public service would be sufficiently safeguarded.

Does this make of the employees slaves? Not at all. No more than the soldiers in the army or the sailors in the navy are slaves. No more than Hans is a slave; for Hans, if hired by the month, cannot lawfully quit his employer's service without giving a month's notice. It simply takes the club out of the hands of the employees and puts it into the hands of a disinterested tribunal.

Does it deprive the corporation of efficiency in dealing with its corporate problems? Not at all. If the directors prove themselves incapable of so managing the corporation that they can pay interest on the bonds, the law now takes it out of their control and puts it into other hands. If they prove incapable of so managing the corporation that they can satisfy the just demands of their employees—demands declared to be just by an impartial tribunal after public investigation—it is not unjust to take the management out of their control and put it into other hands. The rights of employees ought to be as well safeguarded by law as the rights of the bondholders.

“Certainly the system which leaves the city of Philadelphia for weeks, and threatened to leave the citizens of all the states west of Chicago for weeks, without necessary transportation cannot be defended on the ground that it is efficient.

Why is This Thus

The members of the bar of the state are all too busy with private interests to discuss public questions

Probably there is no other state in the Union where that condition exists.

Lawyers, as a rule, are the most interested class in all public matters, and are always ready to “take sides” and show their hand. The exception obtains only in West Virginia.

It is a safe wager to make that no member of the West Virginia bar will be persuaded to appear in public print on any public measure during the year 1910.

Why this is so we do not venture to explain. We only know that it is so—for we have tested it. “We are confronted with a condition, not a theory.

There are many questions now of a strictly professional character, that we are sure interest every practical lawyer, upon which they have convictions that would be very interesting to the readers of this journal, and to which we have fondly hoped they would contribute, but we give it up.

However, We are still willing to be agreeably surprised.

We are surprised that any man wants a circuit judgeship. We are surprised that any man who has it lives any length of time. Harder work and harder conditions under which to do the work can hardly be equaled in any other vocation. A court room is usually the dirtiest, unhealthiest, and most poisonous place that can be found in a community. The atmosphere would kill rats. The judge who lives and works in it must have something of the nature of a mole. These are the only two animals we are acquainted with that could survive such conditions.

Arson by Husband of Wife's Property

(By Judge J. C. McWhorter.

TO THE BAR:—

I take pleasure in responding to your personal request to me to explain why I held recently, in the case of the State v. Baughman, in Webster county, that, under our arson statute, the husband is not guilty of arson where he burns the dwelling house of his wife in which he and she are, at the time, living together as husband and wife. Such was my holding, and my reasons, briefly, are these:

Baughman was indicted under section 2 of chapter 145 of the Code for burning the dwelling house of another in the day time. It should be noted that under this statute the offence is not for maliciously burning *any* dwelling house, as it is under the statutes of some states, New Hampshire, for instance, but for maliciously burning the dwelling house of *another*. Arson, under this section, as well as under section 1 of the same chapter,

as regards dwelling houses, is an offence against the domicile, the habitation, and regards the *possession* rather than the property. The statute does not describe the house as the *property* of another, but as the *dwelling* of another; and it is against this dwelling place, this abiding place, this habitation, that the offence is committed. It is not the legal title, but the possessory right, that is involved. At common law, and clearly under the statute as well, one cannot commit arson of his own house; but the malicious burning by one of a house on his own land is arson, where the house is, at the time, occupied by another as a dwelling for such other party, in such case, by his occupancy and possession, has a qualified, but sufficient, ownership under the law. While he does not, in fact, own the house, he does own the right of possession, the dwelling, the habitation; and I repeat, it is the *security* of this *habitation*, rather than the property interest, that is so protected. 2 Bish. New Cr. Law, §12.

It is perfectly clear that at common law the wife does not become guilty of arson by burning the husband's house in which both live as husband and wife at the time. There seems to be no conflict of authority on this point. *Rex v. Breeme*, 1 Leach 222; 2 East. P. C., 1026; *March's case*, 1 Mood C. C., 182, 2 Bish. N. Cr. Law, §13; 1 A. & E. Ency. of La, (1 Ed.) 761; 2 Bish. Cr. Pro. Sec. 36 and 50.

Then if, at common law, the wife can not be convicted of arson for burning her husband's dwelling house, can the husband under our statutes permitting the wife to own and use her separate estate, be held guilty of arson for burning his wife's house in which they are both living together at the time as husband and wife? The common law does not exempt the wife from criminal liability who burns her husband's house because she is presumed to act under his coercion, but because of the unity of husband and wife in their possession and occupancy of their dwelling. Does the statutes giving to the wife, as well as the husband, the right to own and hold title to the house used and occupied by both as a dwelling, in the slightest measure destroy this unity of possession in the husband and wife? Does it de-

stroy the logic of the common law rule? Bishop says in section 13 of volume 2 of his *New Criminal Law*, "If, under our late statutes, a wife owns the house in which she and her husband reside, he cannot commit arson by burning it, though the statute of arson has the words 'dwelling house of another.'"

The supreme courts of Virginia and this state seem not to have passed upon this question. But a very strong and logical discussion of it is found in the case of *Snyder v. People*, 26 Mich., 106, (12 Am. Rep., 302), in which the Supreme Court of Michigan, speaking through Judge Cooley, a judge of prominent ability, held that "A husband, living with his wife, and having a rightful possession jointly with her of a dwelling house which she owns and they both occupy, is not guilty of arson by the common law, in burning such dwelling house; and this rule is not changed by a statute securing to the wife her separate property."

I can not more clearly express my view of this question than by quoting from Judge Cooley's opinion in this case. In discussing the effect of the married woman's property statutes, which in Michigan are very similar to ours, he says: "As regards her individual property, the law has done little more than to give legal rights and remedies to the wife, where before, by settlement or contract, she might have established corresponding equitable rights and remedies, and the unity of man and woman in the marriage relation is no more broken up by giving her a statutory ownership and control of property than it would have been before the statute, by such family settlement as would give her the like ownership and control. At common law the power of independent action and judgment was in the husband alone; now it is in her also for many purposes; but the authority in her to own and convey property, and to sue and be sued, is no more inconsistent with the marital unity than the corresponding authority in him. * * * So long as they occupy together he is not to be considered as being upon the premises by sufferance merely. He is there by right as one of the legal unity known to the law as family; as having important duties to per-

form, and responsibilities to bear in that relation, which can only be properly and with aptitude performed and borne while the legal unity represents an actuality; as having rights in consort and offspring which can only be valuable reciprocally, while the one spot, however owned, shall be the home of all; and in many ways he still represents the family in important relations of society and government. Some of the legislation on the subject is exceedingly crude; some of it has injudiciously given powers to the wife in the disposition of property, which it has prudently denied to the husband; *but none of it makes the husband a stranger in law to the wife's domicile. The property is hers alone, but the residence is equally his; the estate is in her, but the dwelling house, the domus, is that of both.* * * *

The house in legal contemplation, as regards the offense under consideration, is the dwelling house of the husband himself.” * * * “We confine our attention now to the case of a husband in the practical exercise of the right to reside with his family in the wife's dwelling house, which the wife, at the same time, practically conceded. In such a case the dwelling house can not be said not to be that of the husband.”

I have found but one authority holding contrary to this Michigan case, and that is the case of *Garrett v. State*, 109 Ind., in which the Supreme Court of Indiana holds, in effect, that the Indiana married woman's property laws change the common law rule. But the reasoning of Judge Cooley is so clear, and the married woman's property laws of Michigan and of this state are so nearly alike, and their laws against arson being almost *verbatim* the same, that I was constrained to believe, much to my regret in the case I had on trial, that the doctrine laid down in this Michigan case, and by Bishop and other text writers, was the law of West Virginia. Having reached that conclusion, I could not “Judicially legislate,” but could only follow what I conceived to be the law, leaving it to the legislature to remedy this defect by appropriate legislation.

Whether the husband can thus burn his wife's property with impunity without being liable for damages civilly, I had

not then, and do not have now, occasion to say. It might be also that a husband in such cases is liable to an indictment under section 6 of chapter 115. This seems to be a statute designed to protect the property right in a house, rather than a mere domiciliary or habitation right in it. But whether he would be punishable under this statute or not for such an act, Banghman was not indicted under this statute, and, therefore, no conviction under that indictment could have been sustained because of section 6. Of course I had to decide this matter very quickly and may have been in error, but I fail to find any authorities that satisfy me that my first conception of the law on this subject was wrong. In any event, it occurs to me that this is a matter demanding appropriate legislation, that there may be no uncertainty about it.

J. C. McWHORTER.

Buckhannon, West Virginia, April 13, 1910.

Littlefield's Debt Report

(By J. M. Mason.)

TO THE BAR:—

Littlefield's report, no less pre-eminent for amazing painstaking ability and industry than for clearness of thought and unconscious impartiality, will arrest attention.

The ordinance charges West Virginia with state expenditures within the limits thereof and a just proportion of the ordinary expenses of state government and credits monies from her counties.

First. What meaning, what scope will the court give the expression,—“All state expenditures within the limits thereof?” Virginia history shows that each section often complained of not receiving its share of expenditures, and that, from early times, the state was politically divided into Trans-Allegheny, Valley, the Piedmont Region and Tide-Water. Hence the phrase, “state expenditures within limits” had a definite meaning. For illustration: The convention of 1850 called on the auditor to report the amount of state expenditures in each of the

four divisions during 1848, and although acrimonious debate followed his report, no member of the convention suggested that any disbursement, charged to his section, ought to be classed among expenditures, for the state at large, along with the governor's salary.

The printed record indicates that counsel for the plaintiff, anxious for speedy judgment, carefully excluded from their figures every item which those familiar with Virginia history considered debatable and,, thus excluding doubtful items, they put this charge at \$5,639,302.

Some twenty-five years ago persons supposed competent, and certainly without motive except to determine the minimum which a court, commencing with 1820, must charge under this head, spent months with the original records and compiled statistics which seemed to prove that the minimum could not be less than \$5,643,000. The writer believes it impossible that any one, connected with the Virginia commission, ever had access to the statistics then compiled. It is very suggestive to reflect that accountants, guided by Virginia lawyers whose large fee is contingent on speedy judgment, came within \$4,000 of the amount which 25 years ago the best talent obtainable figured as the minimum for this charge.

Those giving study twenty-five years ago concluded that, if the question ever came before it, the court would hold that it was the purpose of the Wheeling convention to charge West Virginia with all disbursements within her limits which the legislature was accustomed to treat as sectional as distinguished from expenditures for the entire state. But Littlefield distinguishes between the state building a bridge or road, and the state aiding to build it: For example: Sometimes Virginia subscribed for three-fifths of the stock of an internal improvement company and raised cash to pay for this stock by selling state bonds. In other cases she built the bridge or road without the intervention of a company. Littlefield holds that a state expenditure, through the agency of a company, does not come within the meaning of "state expenditures within limits." He says the expenditure

(a) The word "just" had reference to the relative ability of the two sections at the time of separation. (b) Relative ability depends on relative wealth. (c) That slaves must be included would be by the company, not by the state. (See note 1 at end hereof.) Again. He excludes such items as the loan to the Kanawha company. Thus restricting the scope of the phrase he makes the charge for expenditures within limits only \$2,811,559. Probably none doubted that the convention expected this phrase to embrace all the items which Littlefield has excluded. Hence the question narrows to whether the court will read the ordinance in the light of facts which gave it birth?

Second. The ordinance charges "a just proportion of the ordinary expenses of state government." How will the court measure this proportion? It seems that, as the case now stands, West Virginia proposes to rely on an argument as follows:—when estimating relative wealth. But the reply will be. (a) That, as respects ability to carry debt, slaves count as producers of wealth, not as property. (b) That West Virginia did not separate till admitted as a state and, at that time, slaves had been freed. Littlefield ascertains and counsel agrees that, on the basis of relative values in 1863, West Virginia's proportion would be twenty-three and one-half per cent excluding the value of slaves, and fifteen per cent including their value.

Littlefield finds, and we give below, the percentage of West Virginia's proportion of ordinary expenses when the several measures, proposed by the court, are employed.

Third. Littlefield puts the ordinary expenses at \$40,274,000, which is two and a half millions more than Virginia figured them. West Virginia objects to two items aggregating some \$390,000 and also objects to including among ordinary expenses the interest charge of some \$18,500,000. She admits that Virginia paid this much interest during the thirty-eight years, but contends that the interest charge should not be classed among ordinary expenses. Waiving inquiry as to how this contention, if offered seriously, will strike the court, it suffices to consider that, if interest be excluded from ordinary expenses, yet the court is

certain to hold West Virginia (a) for the amount of interest Virginia paid, prior to 1861, for money spent in West Virginia territory; (b) for the interest Virginia paid on Wheeling bonds; (c) for some contribution to the interest paid on money borrowed for asylums, monuments, etc. It seems the accountants did not consider this aspect, but, those who have looked into it, know that the amount will be large. (Note 2.)

The parties agree as to figures and calculations; they disagree (a) As to whether certain disbursements should be classed under certain heads; (b) As to which one of several measures should determine a just proportion of ordinary expenses. One statement exhibits the figures, under each head, furnished by each state, another statement exhibits the percentages ascertained by Littlefield, and West Virginia's proportion of ordinary expenses by each percentage.

Expenditures		Ordinary	
	Within Limits	Expenses	Monies Paid
West Virginia..	\$1,251,288	\$18,207,864	7,051,214
Virginia....	5,639,302	37,794,211	5,954,395
Littlefield..	2,811,559	40,274,896	6,105,884
Populations, 1823-1861		Values, 1863	
Excluding	Including	Excluding	Including
Slaves	Slaves	Slaves	Slaves
28.43 pr. ct	20.22 pr. ct.	23.49 pr. ct.	15.09 pr. ct.
\$11,501,300	\$8,147,400	\$9,463,500	\$6,078,300

During argument, in April 1868, on instructions to the master, some of the court suggested relative federal populations (viz, three-fifths of slaves added to free inhabitants,) as the proper measure of the just proportion. It seems the instruction on this point was inadvertently omitted, but, as the populations are in the record, the court may calculate the percentage in 1863: to wit, approximately twenty-six and a half per cent, making the amount about ten and a half millions.

The court must determine, from this record before it, the amount:--(a) for expenditures within limits, and is more likely to adopt the Virginia figures than Littlefield's; (b) for ordinary

expenses, and is almost certain to adopt Littlefield's figures; (c) for monies paid; viz, the credit, and it seems perfectly safe to assume that it will adopt Littlefield's figures. The court must then determine the measure for a just proportion of ordinary expenses, and the great probability is that it will measure by federal populations. If these conjectures are correct, then the court will inevitably make figures as follows: Charge \$5,639,000 for state expenditures and \$10,500,000 for ordinary expenses and credit \$6,105,000 bringing the state in debt ten millions.

(This paper, being restricted to the ordinance account, omits Virginia's claim for property transferred by the act of 1863. The New York committee can make no demand as to this property, and the evidence about it is surprisingly meager. Littlefield puts the amount at half a million.)

It seems too plain to argue that this state has everything to gain and nothing to lose by continuing the case before the court hears Littlefield's report.

Attention is called to the fact that the ordinance says that West Virginia shall be charged with expenditures and ordinary expenses and credited with monies "since any part of the debt," which existed January, 1861, was first "contracted." Here is a plain enactment that the accounting shall commence on the day when "any part of said debt was contracted." It is assumed that no lawyer thinks that either counsel or court could change this enactment and substitute for it something entirely different. The record, page 333, states that counsel agreed that the accounting should begin, not "when any part of said debt was contracted," but should begin March 19, 1823; to wit, more than twenty years subsequent to the time when the ordinance says it shall begin. Those investigating this matter twenty-five years ago examined records which seemed conclusive that a part of the debt, which existed in 1861, "was contracted" prior to 1795. The records were then sufficiently examined to satisfy men, supposed to be very competent for such work, that certain obligations, issued prior to 1795, had been exchanged for bonds, issued after 1820, and that certain of these bonds were funded under the act of 1871. It is surprising that counsel for West Virginia did not put this fact into record.

If it be said that, owing to the lapse of time, and consequent loss of evidence, it is not possible to state the account which the ordinance requires, then comes the question whether the court will venture to exercise a power unknown to our civil polity and contrary to the basic principle of the federal constitution? Will the court write into the ordinance words making its meaning different? If it be said that, on grounds of public policy, laches may not be attributed to the sovereign and that time does not run against the king, the reply is that this doctrine has not as yet been applied to a mere money contract between two states. Limited space forbids elaboration, but it is easy to see why counsel for plaintiff were alert to agree that the accounting should commence as late as 1823, and thereby shut out matter which was before the convention of 1820.

Note 1.—Littlefield's report to the court takes distinctions which the lawyers in the Wheeling convention would have considered untenable. These lawyers, when using the expression "expenditures within limits," were thinking about the amount which, coming out of the treasury, had gone into a bridge or road. But Littlefield sees distinctions as follows: (a) Between money which went into a bridge through the agency of state officials, and money which went into a bridge through the agency of a company. He distinguishes between direct and indirect expenditures within limits and holds that the latter is not within the intent of the ordinance. (b) Between an expenditure which the legislature regarded as an investment and one regarded as a donation. In other words, if the legislature expected revenue from the bridge, then it was not an expenditure within limits. (c) He seems to see a distinction between an expenditure by the state and a state expenditure. The record does not indicate that these distinctions were suggested by counsel. Heretofore opinion seemed unanimous that the amount appropriated to aid building a bridge or road was an expenditure within limits.

Note 2.—The Wheeling convention doubtless considered that West Virginia should not contribute to interest on state ex-

penditures within Virginia, but it seems that counsel proposed to exempt this state from all interest on expenditures within her own limits, and this proposal is untenable. If the court separates the interest charge from ordinary expenses, the result may be illustrated as follows: Some expenditures within limits were before 1830 and some were after 1850. Say the average was nineteen years, and suppose these expenditures aggregate five and a half millions, and suppose the court measures the just proportion by federal populations. Then the figuring will be: Charge \$5,500,000 for expenditures within limits, and charge \$6,270,000 for nineteen years' interest, and charge \$5,830,000 for 26½ of twenty-two millions of ordinary expenses, and credit \$6,105,000, bringing the state in debt \$11,495,000.

Clean Hands

Not long since a lawyer of known rectitude undertook the defence of a man charged with a heinous crime. The case came to the attorney because of his particular knowledge of the branch of the law to which it belonged, or rather to the minute section of that branch of the law. The client had been charged with like offenses before, but had escaped prosecution. Nevertheless the attorney accepted the retainer and gave his whole heart to the preparation of his case.

The case was prepared conscientiously, carefully, honestly. That this particular attorney would countenance sharp practice of any sort was absurd. When witnesses were brought for his examination he accepted them in good faith and accepted their stories. If these stories were true, his client was innocent--wherefore he worked the harder to avert a miscarriage of justice.

At last came the trial, the prosecution adduced its proofs; then appeared the witnesses for the defense with their stories that would acquit without ground for a doubt in the minds of the jurymen. The stories were told as they had been outlined to the attorney for the defense, but the prosecutor was alert. He cross-examined skillfully, then he adduced testimony in impeachment. Witness after witness went to pieces, and the one on whose tes-

timony most faith had been placed by the defense was shown to have testified for hire; to have perjured herself for a sum of money paid to her by the defendant himself.

It was embarrassing for the defendant's attorney. It was more than embarrassing. The reputation which he had spent a score of years in raising up was overturned at one stroke. Yet he was innocent of wrongdoing. What his client had done was without his knowledge, yet he suffered for it. The community at large made up its mind that he had prepared the case—that he had corrupted the witnesses and planned the line of perjured testimony. He had handled the filth and his hands were fouled.

This incident is well worthy of careful consideration. Is it safe to accept business which may result in such a scandal? Is it not best to refuse the retainer when soiled hands are likely to result? Surely a fee in the hand is not worth a reputation in the mud.—L. S. Helper.

Newly Discovered Evidence

In *State v. Stowers* (November 1909, 66 S. E., 323) the Supreme Court of Appeals of West Virginia administers in a criminal case the usual rule that newly discovered evidence must not be merely corroborative, but material, and such as will call for a different verdict.

It was also held that upon a motion for a new trial because of new evidence "it is not enough for a prisoner to say that he did not know before the trial that he could prove such matters, but he must show the exercise of diligence in some proper way fitting the case to ascertain such matters."

In *People v. Williams*, also a criminal case (October, 1909, 89 N. E., 1030,) The Supreme Court of Illinois formulates the tests for the granting of a new trial on the ground of newly discovered evidence as follows: The evidence must appear to be such as will probably change the result if a new trial be granted; must have been discovered since the trial; must be such as could

not have been discovered before the trial by the exercise of due diligence: must be material to the issue, and must not be merely cumulative to the evidence offered on the trial.

It appeared that accused was charged with an offense in less than three weeks after its commission, and was indicted, tried and convicted within a month. After conviction he asked a new trial on the grounds that he had discovered that he was at home when the offense was committed: that he had before inquired of several persons in a vain attempt to discover where he was at that time, without showing what reason he had to believe that they would know of his whereabouts at that time, and that he afterwards obtained the information from a doctor and nurse who were, on the date of the offense, attending the accused's wife, who was seriously ill. It was held that proper diligence to obtain testimony of the doctor and nurse before the trial was not shown.

The court said in part:

"It would be a dangerous rule to grant a new trial upon an ex parte statement that certain material facts which had previously been known had been forgotten. It may be that in a sense a forgotten fact is practically the same as if it had never been known: but the liability to fraud and the temptation to perjury in such cases forbid that a new trial should be granted because a party against whom a verdict has gone makes oath that he has forgotten material parts of his evidence. In order to prevent, so far as possible, fraud and imposition which defeated parties may be tempted to practice as a last resort to escape the consequence of an adverse verdict, applications for new trial on account of newly discovered evidence should always be subjected to the closest scrutiny by the court. The rules of law which govern in such cases, if carefully observed, will generally accomplish justice. There is, of course, a bare possibility that a rigid adherence to these rules may, in exceptional cases work an injustice, but this is unavoidable. Neither the law nor the means of enforcing it are infallible, nor are the methods appointed by the law for the discovery of truth and the detection of error immune

from mistakes; but it is far better that a single person should suffer mischief than that the rules be so relaxed that every litigant will have it within his power, by keeping back part of his evidence and then swearing that it was forgotten, to destroy a verdict and obtain a new trial at his pleasure."

Mr. Justice Brewer

In one of his public addresses the late Justice Brewer quoted Lord Mansfield's saying that he wished popularity, not the popularity that is run after, but that which sooner or later never fails "to do justice to the pursuit of noble ends by noble minds." It was the popularity that Mr Justice Brewer coveted, and he won it by the frankness, courage and liberality of his opinions uttered as a citizen on every occasion suitable for their expression. He would not allow himself to be restricted by the conventional dignity of judicial place, maintaining that the ermine should not cover him as a cloak of silence. He remained a citizen, with the citizen's right to think for himself and the impulse to speak his thoughts, although he sat on the bench of the supreme court.

Mr. Justice Brewer was aware that he did not escape criticism when he discussed public questions, impending laws, and even the national administration, but he thought that his life tenure on the bench should furnish the answer to those who thought that he was not actuated by an ideal of duty to his countrymen and his generation. He opposed the annexation of the Philippines and later urged their independence and neutralization. He desired to see immigration restricted because he feared submersion of the "Anglo-Saxon" stock. He scouted the idea of an invasion of the United States by a formidable force, and believed that a nucleus of an army, susceptible of rapid expansion, would be sufficient for the national defense. He advocated woman suffrage. Paternal government he condemned, deprecating the growing tendency to call on congress to do what it was the province, and should be accounted the privilege, of

the states to do for themselves. Of the income tax he said: "If once you give the power to the nation to tax all the incomes you give the power to tax the states, not out of their existence but out of their vitality."

The federal judiciary, he held, "Must continue to be the bulwark of our liberties if they are not to perish." There was no other power "to save the country from the consequences of legislative wandering beyond constitutional limits." He regretted that the convention did not make the Presidential term seven years and the President ineligible for a second term, as was proposed. "If that were the provision," he said on one occasion, "we should not now have the spectacle of our strenuous President playing a game of hide and seek with the American people."

To appreciate the civic usefulness of David J. Brewer, and the quality of his patriotism, it was not necessary to subscribe to all his views upon public questions. His service was two-fold; as judge of the supreme court during twenty momentous years and as a citizen who spoke his most innermost thought for the general good. In both capacities he will be highly and deservedly honored.—N. Y. Sun.

Reversed Because of Irrelevant

The decision of the Appellate Term in *Rothschild v. Weingreen* (February, 1910, 121, N. Y. Supp., 234) may be noted not because the circumstances involved were unusual, but because they are of a class that is altogether too common. Although warnings to trial judges and to the bar against the presentation of irrelevant matter to juries are frequently administered by appellate courts, the practice of attempting to win cases through passion and prejudice persists, and it is therefore expedient to give as wide publicity as possible to efforts of that nature that in the end go for naught. In *Rothschild v. Weingreen* it was held reversible error in an action for damages for assaulting plaintiff and attempting to kiss her, to admit evidence as to whether de-

defendant had been divorced and had been named a corespondent in a divorce suit. Speaking for the Appellate Term, Mr. Justice Seabury, said:

“The plaintiff was employed as a model by the defendant, who was a furrier. She claims that during the luncheon hour her employer told her to remain in the store, and that he assaulted her and attempted to kiss her. The plaintiff was uncertain as to the date of the alleged assault, and admits that she made no outcry, and told no one of the occurrence shortly after it happened. She testified that after the assault the defendant left the place and that she remained until late in the afternoon, as she wished to tell the defendant on his return what she thought of his conduct. The plaintiff was not corroborated either by witnesses or circumstances. The defendant denied absolutely the charge against him, and testified that the plaintiff was an inexperienced and incompetent model and that he ‘called her down for not standing straight’ and that the next morning she did not appear at the store. The defendant was corroborated in some respects by the testimony of two of his employes. Upon cross-examination counsel for the plaintiff asked the defendant whether he had ever been divorced. This inquiry was followed up by a dozen more of a similar nature, asking whether he had not been named as corespondent in a divorce suit and had papers served upon him in such an action. All of these questions were objected to by the defendant’s counsel, but the objections were overruled and the defendant duly excepted.

In view of the nature of the case, it is apparent that these questions were asked solely to prejudice the defendant in the eyes of the jury. In no view of the case were they relevant. The objection to them should have been promptly sustained by the court, and counsel for the plaintiff prohibited from asking other questions of a like nature. We think it probable that, in a case where the issue was so narrow as it was here, the defendant may have been prejudiced by the suggestions which were repeatedly made in these questions. A verdict won by such means is not fairly won, and will not be allowed to stand. The courts of

late have had frequent occasion to rebuke improper conduct of this kind, and have repeatedly enunciated the rule that where such conduct is resorted to the judgment will be reversed. Salutory results from this rule can only be secured by the action of the courts in adhering consistently to it, to the end that it may be understood that resort to such unfair means will in every case carry with it the penalty of reversal. This case should be retried, and submitted to another jury to pass upon, under circumstances that secure a fair trial to both of the parties."

Similarly it has been held that where an advocate asks a witness questions which he must be assumed to know cannot be permitted to be answered, and so indirectly gets before the jury the substance of incompetent testimony, the judgment should be set aside if there be reason for apprehending that the verdict was influenced by such misconduct (*Cosselmon v. Dunfee*, 172 N. Y., 507; *Barton v. Brewley*, Wis., 36 N. W., 35.)

In *Scott v. Barker* in the First Appellate Division of the Supreme Court (129 App. Div., 241, 249,) Mr. Justice Clarke, speaking for the court, said:

"We cannot escape the conclusion that the verdict was due to matters to which we regret to be obliged to allude.

"The trial counsel in his zeal and eagerness in behalf of his clients succeeded in creating an atmosphere in the court room which we think could not fail to have its effect upon the jury. Against the repeated objections of the defense and apparently uncontrolled by the court, under the guise of arguing upon the admission or rejection of evidence, he repeatedly and persistently in effect summed up to the jury all through the case. In this way many things not in evidence got before the jury calculated to affect them upon a contest between the disinherited daughters of the first wife and the widow who had married their father under the circumstances disclosed. By the peculiar phraseology of his questions counsel succeeded in himself testifying rather than eliciting testimony from the witnesses. We think that counsel should learn that the verdict is not the only thing to obtain in a

trial in a court of justice, but that it must be obtained in an orderly and proper manner, and that if counsel transcend just and proper bounds the result obtained by such methods cannot stand."

How The Villian Escaped

As a burglar was trying to break into the house of a citizen of a foreign city the framework of the second story window to which he clung gave way and he fell and broke his leg. Limping before the justice the next day he indignantly demanded that the owner of the house be punished.

"You shall have justice," said the judge.

The owner, being summoned, claimed that the accident was due to the poor woodwork, and that the carpenter, not he was to blame.

"That sounds reasonable," said the judge; "let the carpenter be called."

The carpenter admitted that the window was defective. "But how could I do better?" said he, "when the mason work was out of plum?"

"To be sure," replied the judge, and he sent for the mason.

The mason could not deny that the coping was crooked. He explained that while he was placing it in position his attention was distracted from his work by a pretty girl, in a blue tunic, who passed on the other side of the street.

"Then you are blameless," said the judge, and the girl was sent for.

"I admit," said she, "that I am pretty, but that's not my fault, and if the blue tunic attracted the mason's attention the dyer, not I, is responsible."

"That's good logic," said the judge; "let the dyer be called."

The dyer came and pleaded guilty.

"Take the wretch," said the judge to the thief, "and hang him from his doorpost."

The people applauded this wise sentence and hurried off to carry it out. Soon they returned and reported that the dyer was too tall to be hung from his doorpost.

"Find a short dyer and hang him instead," said the judge with a yawn; "let justice be done at any cost."—Law Student's Helper.

How Mr. Root Earned a Big Fee

A story presumably authentic, but the accuracy of which we do not vouch for, is told of the way Senator Elihu Root secured a fee of \$250,000 for two days' service to the Sage estate:

After the death of Russell Sage a legal snarl presented itself as to the distribution of the estate, variously estimated at from \$140,000,000 to \$200,000,000. Mrs. Sage, kindly, generous and just, wanted the legal question settled quickly and by authority.

"I want to see Mr. Elihu Root," she said to her advisor "and say to him that I will consider it a distinct favor if he will pass upon this question and give to me his decision."

Communication was opened up at once with the then secretary of war. A special messenger called upon him. He was too much engrossed with his official duties to give the request attention.

"Please say to Mrs. Sage," said he, "that it will be impossible for me to act. I am not practicing law now."

"But it is not a question of fee, Mr. Root," said the intermediary. "Mrs. Sage insists that you, and you only, shall advise in this matter."

"I repeat," replied the war secretary, "that I do not wish to be retained, and you may say that nothing further need be suggested. My fee would be practically prohibitive and I want it to be so regarded."

"And that fee would be—"

"Well, say \$250,000," was the reply, in a tone intended to cut off further discussion.

That same day telegraphic communication with Mrs. Sage was opened. "Pay it," she said. Mr. Root was astounded when informed that his "prohibitive" fee was regarded as settled. He accomplished what he had to do in less than forty-eight hours; without appearing in court and without engaging additional aid, and Mrs. Sage was very well satisfied.—Green Bag.

A Final Word on the Law's Delay

We are now told for the twentieth time in despatches from Washington that the president is going to condemn the law's delays in his coming message to congress.

There is no subject that delights the ready-made reformer more than this. He likes to "jump on the courts." He knows everybody will agree with him that the law's delay is a dreadful thing. He has only to denounce "technicalities" to be certain of carrying his audience or his readers with him. Indeed, one New York newspaper recently asserted that an indicted defendant "interposed the usual technical plea of not guilty." It would be interesting to know what sort of a plea could be deemed non-technical by the writer of that statement.

The fact that President Taft is a lawyer and has been a judge gives emphasis, of course, to his well known opinion to the effect that the procedure in our courts of justice is too slow. We have protested and still protest that his criticism in this respect has not been sufficiently discriminating. He treats all the states alike; whereas in truth and in fact, as the lawyers phrase it, there is the greatest possible difference in the different states as to the expedition attainable in the prosecution of a lawsuit and also in respect to the recognition of technical objections in the appellate tribunals.

Many of those critics who denounce the law's delays most vehemently find fault with the system of appeals, and many would abolish all right of appeal. In all discussions of this subject, and particularly in comparing the American with the English procedure, it should be remembered that a liking for the privilege of appeal in their lawsuits seems to be an ingrained characteristic of the American people. It is manifested in the

fundamental law of most of the states of the American Union. Our citizens want the right of review by an appellate court—and sometimes by two appellate courts—almost as much as they want the right of trial by jury itself; and no project of law reform will ever be effectual which does not take this feeling into account.

It is a matter of the first importance to the community, however, that its trial judges shall be lawyers of such ability that they will make very few mistakes for the appellate tribunals to correct. We have always insisted that the people cannot take too much pains to select men of first rate ability for the trial bench.—New York Sun.

Charles W. Morse and the Federal Bench

The decision of the United States Circuit Court of Appeals in the case of Charles W. Morse is unpopular. Morse has figured for months in the public prints as a man of pluck and determination, fighting for rehabilitation against almost overwhelming odds. In the common acceptance he has been the under dog. His reverses and successes have been followed with sympathy, especially his successes. As the press has recorded from time to time his liquidation of debt after debt in the schedule of his vast indebtedness, and Morse has been seen to reassume step by step his executive sway, a great part of the public has confessed its sense of gratification. For such people he was the stout swimmer engulfed and swept away to sea, but ever indomitable in his spirit and incapable of surrender.

No balance sheet of morals or account of disabilities is dressed against a man in such case. The sentimental and emotional appeal predominates, just as the element of the picturesque and the temerarious in lying, or in other moral delinquency, not only disarm criticism but excite the applause of the mob. Thus we explain to ourselves the disclosure of a widespread feeling of commiseration and active sympathy for Morse when the federal court arrests his audacious and triumphant progress to-

ward self rehabilitation and renewed wealth and consigns him to the penitentiary for a term so long as to imply his finality.

And yet we are convinced that few decisions have been more salutary than this which condemns Morse to a felon's doom. Of his guilt and his personal infamy there has never been any doubt; of his utter unfitness for any place of trust or confidence there has been no question. If he went unscathed it would only be because his bankruptcy was surreptitiously subtended by the possession of money and because the money was backed by all the specious ability and devious rascality which first led him into crime.

Such a decision reaffirms the stability of justice. There is not one law in our federal courts for the poor and another for the rich. There is simply the decorous and proper movement of the law itself, overcoming with dignity and assurance all the obstacles strewn in its path by wealth and ingenuity. We count it a most wholesome thing that it has come to pass, and we deem that it should prove a warning to not a few men of notable place and standing, men even of quasi-lofty repute, that it ill becomes them to seek indentification and association with a malefactor simply because he seems about to evade the penalty of his malefactions and resume presently the dispensation of his customary and lucrative favor.—The Sun.

Another Victim

The late Senator Pugh of Alabama, practiced law for many years in Eufaula. A Eufaula man said of him the other day.

"In an eloquent speech on circumstantial evidence I once heard Senator Pugh drive home the danger of this sort of evidence with a good anecdote.

He said that a Eufaula woman made one of those corn pone puddings for which the ladies of our state are famous. She put the pudding on a shelf to cool, and then she went out to have a dress fitted. Her little son, Jabez, was left in the house.

"Jabez played with his toys till he got hungry. Then he put a chair beneath the shelf, climbed up and ate all of the de-

licious pone pudding that his small interior would possibly hold. To conclude he did a strange thing.

"He caught the cat, dabbled her four paws in the soft yellow custard in the bottom of the dish, and then set her down. She scampered through the kitchen into the dining room and parlor, and thence out of doors. On the bare boards of the kitchen, on the dining room's red carpet, and on the parlor carpet of green she left impartially small golden footprints, very neat, very conspicuous. The boy smiled softly to himself.

"And that evening, on his father's return, he heard a wild scampering below, the banging of the front door, a terrified mewling and the sharp crack of a rifle.

"Then little Jabez smiled softly to himself again.

"Ah, me," he said, "there goes another victim of circumstantial evidence."

"These, I fear are truisms, but I suppose that after all truisms are the best antidote for sophisms." *Per Russell J., in Craig v. Thompson, 42 Nova Scotia 150, 161.*

"It is hard that a young woman who has sustained severe injury by a force controlled by a corporation should alone suffer, even though she negligently went in the way of that force," *Per Mr. Justice Gary, in West Chicago, etc., R. Co. v. Boeker, 70 Ill. App. 67.*

"The position of a married woman who lives apart from her husband is a very unpleasant one." *Per Stevens, V. C., in Sutcliffe v. Eisele, 62 N. J. Eq. 222 Atl. Rep. 77.*

It is a well known fact that after a prolonged controversy"—between jurors while deliberating, in this case—"pride of opinion is apt to blind the eyes to the truth." *Per Albert, C. in Jessen v. Donahue, (Neb.) 96 N. W. Rep. 639, 641.*

The Income Tax Decision of 1905

The intention of the proposed sixteenth amendment to the Constitution is (and its effect if ratified by the legislatures of three-fourths of the states will be) to overrule and annul the opinions of a majority of the supreme court in the income tax cases. Every one who is to vote for members of the legislatures who are to decide that important question will naturally wish to read the vital part of the decisions he will be called to pass judgment on.

Confusion has arisen regarding these decisions because there were two. In the first case the court decided by six to two that an unapportioned tax on the rent of real estate was unconstitutional, but upon each of the other questions argued at the bar, to wit: (1) Whether the void provisions as to rents and income from real estate invalidated the whole act; (2) whether as to the income from personal property as such the act is unconstitutional as laying direct taxes; (3) whether any part of the tax, if not considered as a direct tax, is invalid for want of uniformity on either of the grounds suggested. The justices who heard the arguments were equally divided, and therefore no opinion was expressed.

Only eight justices sat, and a rehearing was had, at which all of the nine were present. Of these there were five—the Chief Justice from Illinois, Gray from Massachusetts, Field from California, Brewer from Kansas and Shiras from Pennsylvania—who formed a majority concurring in the second judgment. Justices Harlan of Kentucky, Brown of Michigan, White of Louisiana and Jackson of Tennessee made up the minority, whose opinions have been extensively read and commented on in the South and middle West to the prejudice of the opinion of the court. As reason for that lies in the fact that while the Republicans have generally approved and upheld the opinion of the majority of the court in both cases, the Democratic organization condemned it, relying on the opinions of the minority justices, which were largely circulated.

The opinion of the court in each case, written by the chief justice, is very full and convincing, especially in its historical part and in extracts from previous pertinent decisions of the court. The portion which we give contains the main points decided and the reasons therefor. It is not to be assumed that any competent voter will overrule and condemn them till after he has made a careful study thereof.

The chief justice said:

The Constitution divided federal taxation into two great classes—the class of direct taxes and the class of duties, imposts and excises—and prescribed two rules which qualified the grant of power as to each class.

The power to lay direct taxes, apportioned among the several states in proportion to their representation in the popular branch of congress—representation based on population as ascertained by the census—was plenary and absolute, but to lay direct taxes without apportionment was forbidden. The power to lay duties, impost and excises was subject to the qualification that the imposition must be uniform throughout the United States.

Our previous decision was confined to the consideration of the validity of the tax on the income from real estate and on the income from municipal bonds. The question thus limited was whether such taxation was direct or not in the meaning of the Constitution. And the court went no further as to the tax on the income from real estate than to hold that it fell within the same class as the source whence the income was derived—that is, that a tax upon realty and a tax upon the receipts therefrom were alike direct; while, as to the income from municipal bonds, that could not be taxed because of want of power to tax the source, and no reference was made to the nature of the tax as being direct or indirect.

We are now permitted to broaden the field of inquiry and to determine to which of the two great classes a tax upon a person's *entire* income—whether derived from rents or products or otherwise of real estate, or from bonds, stocks, or other forms of personal property—belongs; and we are unable to conclude that the enforced subtraction from the yield of all the owner's real or personal property, in the manner prescribed, is so different from a tax upon the property itself that it is not a direct but an indirect tax in the meaning of the Constitution.

The reasons for the clauses of the Constitution in respect to direct taxation are not far to seek. The states respectively possessed plenary powers of taxation. They could tax the property of their citizens in such manner and to such extent as they saw fit. They had unrestricted powers to impose duties or imposts on imports from abroad, and excises on manufactures, consumable commodities or otherwise. They gave up the great sources of revenue derived from commerce. They retained the concurrent power of levying excises and duties if covering anything other than excises: but in respect of them the range of taxation, and to that they looked as their chief resource; but even

in respect of that they granted the concurrent power, and if the tax were placed by both governments on the same subject the claim of the United States had preference. Therefore they did not grant the power of direct taxation without regard to their own condition and resources as states, but they granted the power of apportioned direct taxation—a power just as efficacious to serve the needs of the general government but securing to the states the opportunity to pay the amount apportioned and to recoup from their own citizens in the most feasible way and in harmony with their systems of local self-government. If in the changes of wealth and population in particular states apportionment produced inequality, it was an inequality stipulated for, just as the equal representation of the states, however small, in the senate, was stipulated for. The Constitution ordains affirmatively that each state shall have two members of that body, and negatively that no state shall by amendment be deprived of its equal suffrage in the senate without its consent. The Constitution ordains affirmatively that representatives and direct taxes shall be apportioned among the several states according to numbers, and negatively that no direct tax shall be laid unless in proportion to the enumeration.

The founders anticipated that the expenditures of the states, their counties, cities and towns, would chiefly be met by direct taxation on accumulated property, while they expected that those of the federal government would be for the most part met by indirect taxes. And in order that the power of direct taxation by the general government should not be exercised except on necessity, and when the necessity arose should be so exercised as to leave the states at liberty to discharge their respective obligations, and should not be so exercised unfairly and discriminately as to particular states or otherwise by a mere majority vote, possibly of those whose constituents were intentionally not subjected to any part of the burden, the qualified grant was made. Those who made it knew that the power to tax involved the power to destroy, and that in the language of Chief Justice Marshall "the only security against the abuse of this power is found in the structure of the government itself."

Whatever the speculative views of political economists or revenue reformers may be, can it properly be held that the Constitution, taken in its plain and obvious sense and with due regard to the circumstances attending the formation of the government, authorizes a general unapportioned tax on the products of the farm and the rents of real estate, although imposed mere-

ly because of ownership and with no possible means of escape from payment as belonging to a totally different class from that which includes the property from whence the income proceeds.

There can be but one answer unless the constitutional restriction is to be treated as utterly illusory and futile and the object of its framers defeated. We find it impossible to hold that a fundamental requisition deemed so important as to be enforced by two provisions, one affirmative and one negative, can be refined away by forced distinctions between that which gives value to property and the property itself.

Nor can we perceive any ground why the same reasoning does not apply to capital in personalty held for the purpose of income, or ordinarily yielding income, and to the income therefrom. All the real estate of the country, and all its invested personal property, are open to the direct operation of the taxing power if an apportionment be made according to the Constitution. The Constitution does not say that no direct tax shall be laid by apportionment on any other property than land; on the contrary, it forbids all unapportioned direct taxes; and we know of no warrant for excepting personal property from the exercise of the power or any reason why an apportioned direct tax cannot be laid and assessed, as Mr. Gallatin said in his report when secretary of the treasury in 1812, "upon the same objects of taxation on which the direct taxes levied under the authority of the state are laid and assessed."

Personal property of some kinds is of general distribution, and so are incomes, though the taxable range thereof might be narrowed through large exemptions.

Nor are we impressed with the contention that because in the four instances in which the power of direct taxation has been exercised congress did not see fit, for reasons of expediency, to levy a tax upon personalty, this amounts to such a practical construction of the Constitution that the power did not exist that we must regard ourselves bound by it. We should regret to be compelled to hold the powers of the general government thus restricted, and certainly cannot accede to the idea that the Constitution has become weakened by a particular course of inaction under it.

The stress of the argument is thrown, however, on the assertion that an income tax is not a property tax at all; that it is not a real estate tax, or a crop tax, or a bond tax; that it is an assessment upon the taxpayer on account of his money spending power, as shown by the revenue of the year preceding the assess-

ment; that rents received, crops harvested, interest collected, have lost all connection with their origin, and although once not taxable, have become transmitted in their new form into taxable subject matter—in other words, that income is taxable irrespective of the source from whence it is derived.

We have unanimously held in this case that so far as this law operates on the receipts from municipal bonds it cannot be sustained, because it is a tax on the power of the states and on their instrumentalities to borrow money, and consequently repugnant to the Constitution. But if, as contended, the interest when received has become merely money in the recipient's pocket and taxable as such without reference to the source from which it came, the question is immaterial whether it could have been originally taxed at all or not. This was admitted by the attorney general with characteristic candor, and it follows that if the revenue derived from municipal bonds cannot be taxed because the source cannot be, the same rule applies to revenue from any other source.

Cannot congress, if the necessity exist of raising thirty, forty or any other number of millions of dollars for the support of the government, in addition to the revenue from duties, imposts and excises, apportion the quota of each state upon the basis of the census, and thus advise it of the payment which must be made, and proceed to assess that amount on all the real and personal property and all the income of all persons in the state, and collect the same, if the state does not in the meantime assume and pay its quota and collect the amount according to its own system and in its own way? Cannot congress do this as respects either or all these subjects of taxation, and deal with each in such manner as might be deemed expedient; as, indeed, was done in the act of July 14, 1795 (1 Stat. 597, c 75?)

We have considered the act only in respect of the tax on income derived from real estate and from invested personal property, and have not commented on so much of it as bears on gains or profits from business, privileges or employments, in view of the instances in which taxation on business, privileges or employments has assumed the guise of an excise tax and been sustained as such

“We know that the laws which govern human action are subject to occasional exceptions which seem little short of miraculous.” *Per Hamersley, J.*, in *Cook v. Morris*, 66 Conn. 1996, 33 Atl. Rep. 994.

Reforming the Law and the Courts

Judge Hiram T. Gilbert at the meeting of the Illinois Bar Association this summer arraigned the legal profession for doing so little to advance the law. The members of other learned professions were constantly making real improvements in the fields to which they devote their lives and energies. The lawyers for a century had sat supinely by and permitted the legal field to improve itself as it could, with the general result that the field was in a shocking state of cultivation, and the tares of technicality and delay had almost choked out the tender plants of speedy justice. Judge Gilbert's remarks were widely copied in the newspapers of the country, and, at the disheartening revelations, many were the sad headshakings of editors who were not infrequently so kind as to hint at the legal profession how reforms might be accomplished. Why the lawyers have not had time to attend to such matters may be gathered from the eloquent address of Colonel Hamilton Lewis to the American Bar Association. The lawyer was earnestly battling with more important matters even than the improvement of procedure. At the risk of poverty he was upholding law and justice, just as it was and without any reformers' frills, in the face of angry mobs, or he was saving the Constitution from the "chaos of ambitious frenzied fury."

But the Colonel's eloquence must speak in his own sounding periods. "It was the lawyer who scorned the popularity of the crowd to oppose mob violence and in its place substituted security of property and safety of life. It was the lawyer who exposed home, life, and children to penury, had resentful financial powers or vengeful numbers been able to defeat and dishonor him in his efforts to maintain the law and secure its justice." And again: "It was the American lawyer who seized the Constitution from the late chaos of ambitious frenzied fury and, holding it aloft, denounced the pretensions of ruling tyranny of state and nation, and proclaimed that no man's political aims on the one hand or mad dreams of sovereign divinity on the other should ever supplant the decrees of our fathers and implant the despotism of personal pleasure to the death of laws and the destruction of liberty." Truly the lawyer, instead of blushing for himself and his brethren, may, thanks to Colonel Lewis, hold up his head once more and look the country in the face with proud and serene gaze.

It is an era of reform, however, and the various associations

of lawyers are making it hum, as did the Chicago millionaire who went in for culture.

A committee of the American Bar Association, going to the roots of things on paper, has devised a beautiful system of courts which will cause surcease of all legal delay and put the weary litigant at rest. It is woven with the colors of the rainbow, and, like the rainbow, it seems to touch the ground only in Utopia. After pondering for two years, the committee produces this practical plan: "The whole judicial power of each state, at least for civil causes, should be vested in one great court, of which all tribunals should be branches, departments, or divisions. The business as well as the judicial administration of this court should be thoroughly organized so as to prevent not merely waste of judicial power, but all needless clerical work, duplication of papers and records and the like, thus obviating expense to litigants and cost to the public. This court should have three chief branches—county courts, including municipal courts, a superior court of the first instance, and a single ultimate court of appeal. All judges should be judges of the whole court, assigned to some branch or locality, but eligible and liable to sit in any other branch when called upon to do so. Supervision of the business administration of the whole court should be committed to some high officer of the court, who would be responsible for failure to utilize the judicial power of the state effectively."

But all this is not to be accomplished in a day. It is only the "eventual" goal, the culmination of a "gradual but sweeping reform in judicial procedure." Of course the "eventual" goal can only be reached in most states by radical constitutional changes, but this will not deter a conscientious and thoroughgoing legal reform.

As distinguished from the doctrinaire, the practical reformer of every kind builds on the already existing institutions around him. It is useless to expect a people to abandon familiar things, the result of a long evolution, to embark on a course of untried experiment. The whole thing is not unlike the beautiful paper constitutions which the Abbe Sieyes produced so plentifully during the French revolution.—Law Notes.

"Care and prudence increase with that experience which years of maturity bring, but do not come by intuition to a boy in whose veins the blood of youth is leaping, and to whom danger is a pleasant incentive." *Per* Valiant, J., in *Campbell v. St. Louis, etc., R. Co.*, 175 Mo. 161, 75 S. W. Rep. 86, 90.

The New Federal Judicial Code

On March 9, there was introduced in the United States Senate a bill reported from the committee on the revision of the laws of the United States "to codify, revise, and amend the laws relating to the judiciary." The proposed act consists of thirteen chapters containing 286 sections, all under one title; and section 281 provides that "this act may be designated and cited as 'The Judicial Code.'" It makes comparatively few material changes in the existing law, and appears to be a very creditable performance of a task of codification and revision which has long been needed. An innovation which may stir up considerable debate in congress is the consolidation of district and circuit courts under the name of district courts. This is done by sections 274-276 in chapter XII, which read as follows:

"Sec. 274. The circuit courts of the United States, upon the taking effect of this act, shall be, and hereby are, abolished; and thereupon, on said date, the clerks of said courts shall deliver to the clerks of the district courts of the United States for their respective districts all the journals, dockets, books, files, records, and other books and papers of or belonging to or in any manner connected with said circuit courts; and shall also on said date deliver to the clerks of said district courts all moneys, from whatever source received, then remaining in their hands or under their control as clerks of said circuit courts, or received by them by virtue of their said offices. The journals, dockets, books, files, records, and other books and papers so delivered to the clerks of the several district courts shall be and remain a part of the official records of said district courts, and copies thereof, when certified under the hand and seal of the clerk of the district court, shall be received as evidence equally with the originals thereof; and the clerks of the several district courts shall have the authority to exercise all the powers and to perform all the duties with respect thereto as the clerks of the several circuit courts had prior to the taking effect of this act.

"Sec. 275. That all suits and proceedings ending in said circuit courts on the date of the taking effect of this act, whether originally brought therein or certified thereto from the district courts, shall thereupon and thereafter be proceeded with and disposed of in the district courts in the same manner and with the same effect as if originally begun therein, and record thereof being entered in the records of the circuit courts so transferred as above provided.

"Sec. 276. That wherever, in any law not embraced within this act, any reference is made to, or any power or duty is conferred or imposed upon, the circuit courts, such reference shall, upon the taking effect of this act, be deemed and held to refer to, and to confer such power and impose such duty upon, the district courts."

A judge of the new district court will be called "District" judge, and his salary is to be \$6,000 a year, together with reasonable expenses actually incurred for travel and attendance when designated or requested, in accordance with law, to hold court outside of his district, not to exceed ten dollars per day." Judges of the circuit court of appeals will be called "Circuit" judges, and receive a salary of \$7,000 a year, with the same provision for the payment of expenses as above quoted for district judges.

Useless Opinions

There has been more or less said about the "white man's burden," which may or may not actually exist; but there is no doubt that the "lawyer's burden" is to find the law in the multiplicity of decisions daily handed down. The courts being the authors of the burden, it would not seem unjust to expect the judges to lighten it as far as possible by striving that their opinions be not longer than really required and that dissenting opinions should not be filed unnecessarily. There are, however, many flagrant offenders. In a recent case, after the majority had disposed of the case in seven typewritten pages, one judge felt bound to state verbatim 21 pages of evidence, then to recapitulate the same evidence to the extent of 11 pages, and then to dissent for 10 pages—on what the evidence showed. This is not right. It is hard on the lawyer who has to read the case, and who furthermore must buy these useless pages in the reports. Beyond all doubt the author honestly thought his brethren wrong, but his dissent as to the weight of evidence might have been confined to less than half as many lines as he took pages. A dissent on a question of law has some value, though growing doubts exist on that point; but a dissent on the facts is of no use whatever to the profession.—*The Docket*.

"Jealousy is a passion producing as violent effects as any other passion." *Per* Sir William Scott. (Lord Stowell), in *Kirkham v. Kirkham*, 1 Hag. Cons 410.

West Virginia Court of Appeals

Decisions Handed Down at the Last Term

REPORTED ESPECIALLY FOR THE BAR

Appearing Here for the First Time in Print

KISER v. McLEAN, TRUSTEE.

Jackson County Affirmed.

Robinson, President.

SYLLABUS.

1. In a grant of land, an exception of the oil and gas and the right to go upon the land for the same is not defeated by covenants for quiet possession of the land and freedom from encumbrances thereon. Such covenants relate only to the thing conveyed—the land without the oil and gas—the land burdened with the right to operate thereon for the oil and gas retained.

2. Covenants in a deed that are plainly intended to defend that which has been granted must be construed to be only coextensive with the grant.

3. Mere possession of the surface of land as to which the title to the oil and gas in place thereunder has been served is not possession of that oil and gas.

4. Oil and gas served in title from that of the land under which they lie are not in the possession of the owner of the surface, unless he takes actual physical possession of them as by drilling wells into the same.

5. On a claim of forfeiture for non-entry of oil and gas which have been served in title from that of the land under which they lie, it will be presumed that the land was assessed and taxed as a whole at the time of the servance, that it has since been carried on the land books in the same manner, and that the taxes have been paid on the land as a whole when the contrary does not appear.

1. If a railroad company, without the knowledge or consent of the owner, takes the property of a contractor, left stored temporarily on its right of way, and appropriates the same to its own use in a manner indicating a claim of right in opposition to that of the owner the latter may waive the tort and recover the value of the property taken in action of assumpsit.

left on its right of way, it does not become an involuntary bailee thereof and liable to account only as such, as by restoration of the property.

2. By such tortious taking of property by a railroad company, as to the owner, and in damages for the use thereof. The owner may elect to waive the tort and sue for the value of his property, commissioners and challengers.

5. A political party or organization for national, state, county and magisterial district elections is not one for the purpose of a municipal election, unless the members thereof participate as such an organization in the latter by the nomination and support of candidates therein under the party name.

WALKER v. NORFOLK & WESTERN RAILWAY CO.

Mingo County. Affirmed.

Miller, Judge.

SYLLABUS.

HASSON v. CITY OF CHESTER.

Hancock County. Writ Awarded.

Poffenbarger, Judge

1. That which is plainly within the spirit, meaning and purpose of a remedial statute, though not therein expressed in terms, is as much a part of it as if it were so expressed.

2. Of two permissible constructions of a statute, one working manifest injustice and the other equity and fairness, the latter is to be adopted, upon the presumption that the legislature did not intend the results flowing from the former.

3. Section 7 of Chapter 3 of the Code of 1906, relating to the appointment of commissioners of election impliedly gives right of representation to the two leading political parties in every election, and prescribes a mode of determining the right of preference, giving it to those whose candidates received the highest number of votes in the last preceding election, when there are such parties.

4. When none of the parties, participating in any election, took part as an organization in the last preceding election, the statutory rule for determining right of preference is inoperative, but the two leading parties are nevertheless entitled to representation and may demand the appointment of qualified persons, designated by them for

BLACK v. POST.

Upshur County. Reversed and Remanded.

Williams, Judge.

SYLLABUS

1. The law presumes that the grantor is sane and possessed of sufficient mental capacity to make a deed at the time of its execution, and the burden of proving that he was not then sane, or competent, is on the one attacking its validity.

2. If a person is capable of knowing the nature, character and effect of his deed at the time of making it, he is considered as legally *compos mentis*.

3. Eccentricity of manner and mental weakness of the grantor which does not amount to imbecility are not sufficient to overthrow a deed in the absence of proof of fraud in its procurement.

4. Fraud will not be inferred from proof of the mere opportunity to commit it; there must be evidence of actual fraud; this evidence may be either direct or circumstantial, and, if circumstantial, the facts and circumstances relied on to establish fraud must be inconsistent with fair dealing.

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1910-11

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The Bar

VOL. XVII

JULY-AUGUST, 1910

Nos. 5 and 6

THE BAR

Official Journal of the
WEST VIRGINIA BAR ASSOCIATION

Under the Editorial Charge of the
Executive Council.

Published Monthly from October
to May Bi-Monthly from June
to September.

Entered as second class matter
August 11, 1904, Postoffice, Mor-
gantown, W. Va., under the Act
of Congress, March 3rd, 1879.

Price, per copy.....\$.10
Yearly, in advance..... 1.00

Advertising Rates on Request.

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Morgantown, W. Va.

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In the development of the Primary we seem to have reached a stage where we confront a condition rather than a theory. The theory is most beautiful and convincing. The condition is that of disappointment. There seems to be about as much dirt in the primary as in the convention. We have heretofore suggested that the fault is in placing the primary *before* instead of *after* the convention. Why not use the primary as a kind of Court of Appeals from the convention? If any candidate has reason to complain of the methods of a convention, let him appeal to the primary as a matter of right. It would thus become a kind of Clearing House for party disputes and the obliquities of a convention. There would be no primary if the action of the convention was what it ought to be. Either the convention or the primary is superfluous under the existing plan.

The Philadelphia Ledger makes the following contribution to the history of the Bench and Bar in West Virginia:

Several decades ago there lived in Charleston W. Va., a judge noted for his boorish manners. A very finical lawyer whom he specially disliked was once trying a case before him and all the while the barrister spoke the judge sat with his feet elevated on the railing in front of him, hiding his face.

Exasperated by this the lawyer quired:

"May I ask which end of your Honor I am to address."

"Whichever you choose," drawled the Judge.

"Well," was the retort, "I suppose there is as much law in one end as the other."

We will not undertake to make an issue with the chronicler of the above historic incident as to its accuracy in as much as it is ancient history, occurring "several decades ago." However, if the same bar-room manners that are ascribed to the Judge in this bit of ancient history had been a modern picture descriptive of members of the bar sitting on the middle of their backs and turning their intellectual ends up over the trial table in the face of the Judge, we would at once have exclaimed, "that incident is true to life."

"The government never neglects the people unless the people first neglect the government."

The State of Rhode Island has received a handsome present in the shape of \$500,000, in North Carolina bonds, after the recent example of South Dakota. Probably the creditors who donated these bonds are not as thrifty or shifty as the creditors of Virginia, or they would have found some means of getting into court under cover of an action by a State in which they would get the proceeds. Or may be they are just waiting the result of the precedent in the case of Virginia vs. West Virginia.

Mr. C. D. Merrick, of Parkersburg, has shown that the interest of a lawyer is not wholly dormant in the question of an increase of the food supply of our State. He has made a practical statement of the situation through the Parkersburg Sentinel, that if followed by our own farmers and statesmen would solve the problem of the high cost of living—provided only, the combines did not beat it. We wish Bro. Merrick would tell us what to do with the combines.

The highest court in Georgia has recently decided that the maintenance of a stagnant pool in which mosquitoes breed in unusual numbers is such a menace to persons residing in the vicinity as to constitute a public nuisance in a case where it was made to appear that there had previously been no malarial fever in the neighborhood, but an epidemic of malaria had broken out coincidentally with the development of the mosquitoes. This is the first instance, we believe, in which mosquitoes have been judicially declared to be a nuisance. Medical expert testimony was received to the effect that malaria is conveyed by anopheles mosquitoes, but the witness conceded that the bite of a mosquito would not communicate the disease unless the insect had previously bitten a person suffering from malaria. The tenant of the premises affected by such a nuisance was held to be entitled to recover damages from the public service corporation, a water power company maintained the mosquito pool.

Hon. John M. Mason furnishes a further analysis of the Littlefield report in the State Debt case which it will be instructive to read. This is printed in this number of *The Bar*.

The Annual Meeting

We anticipate a good attendance at the approaching annual meeting of the State Bar Association at White Sulphur Springs.

The attendance will be drawn largely from the southeastern counties, which have the geographical advantage this time in the place selected for the meeting. All the members from that section and many lawyers who are not members, can hardly resist the attraction of meeting their brothers under such pleasant circumstances.

To those, however, who reside in the northwestern counties it is a long tedious journey, complicated with numerous changes and breaks in the line of travel, and this condition, we fear, will greatly limit the attendance from that section.

It is only equitable, however, and therefore it has been the aim of the Association, to itinerate over the State and give all parts of it betimes, the advantage of easy attendance. In this instance there is an offset to distance in the pleasant appointments of the Springs for a midsummer meeting.

We hope this will not only prove a pleasant meeting, but that enough business will be mixed with it to make it profitable to the Association. The tendency of all Associations is to be swallowed up in the diversions and delights of their social features. And in saying this, we do not mean to minimize these attractions; they are rightly and essentially a prominent part of the program of such organizations. But we are a practical people, and when it can be said of any Bar Association that it stands only for an annual social spree, it will begin to disintegrate. The field of usefulness for every bar association is so broad and inviting that if it puts aside these opportunities to advance the interests of the Profession, and contribute what it may to

the public weal, it will soon have no influence or standing in the public esteem. There is no national organization of any class that has attained such a character and standing in the country as the American Bar Association. Its annual meetings are events which attract the attention of the nation. And this is because they stand for something more substantial than mere social diversions. There is always something doing, or about to be done in the American Bar Association that invites the interest and cooperation of every member of the Legal Profession.

We hope the various standing committees of our Association will come to the meeting at White Sulphur with reports and suggestions in their respective fields that will stimulate interest and action along practical lines, and thus also become a stimulus to the life of the Association. May we not only have a jolly meeting but a good business meeting.

Taking Depositions in Chancery

There is no lawyer who would not welcome a reform in the procedure of taking depositions in chancery. In a recent number of *The Bar* we published a plan by which we hoped to excite discussion of this subject, and possibly by an inter-change of opinion develop a satisfactory plan of reform.

The plan we published was, in short, to appoint Masters in Chancery, who were competent lawyers, and give them the same jurisdiction of a circuit court over the procedure in taking depositions- subject, of course, to review by the Judge who had the case in hand.

A distinguished member of the bar who has given this subject much thought and whose judgment on any such matter as a practical lawyer, is of much value, has written a review of the plan we proposed, which appears on another page of this issue of *The Bar*. We invite attention to this article.

We are not suprised that the writer advocates the only ultimate and complete reform of having the Chancery Judge sit

and hear the testimony as he and the jury hear it in proceedings at law.

That plan has long had its advocates who have urged it with periodical regularity, but without any perceptable progress toward its practical acceptance.

We want to avow our endorsement of the plan and to declare that it is the only sensible and comprehensive plan.

But in making our proposition we were after something that may be we could get. We prefer a half loaf in this instance to no bread at all. We would favor any change in the existing odious and inefficient system as a step toward reform.

The obstacle in the way of the plan of having the Chancery Judge sit is, that it involves a complete change and reorganization of our whole judicial system. The Circuit Judges are now overworked. It requires all their time to dispose of the business of their respective courts with no time given to the taking of depositions. If they sat to hear the testimony in Chancery Cases, the Circuits would have to be rearranged, the number of Judges increased perhaps one-third to one-half, and the Chancery Court would be in session practically all the year.

The question is whether the legislature could be made to appreciate the importance and value of the reform to vote the necessary increase in the cost of our judicial system and its machinery. Surely not, unless the bar of the State were a unit in urging it, and unless it were urged with a good deal more vigor and earnestness than is prospectively on tap.

It has occurred to us that this reform will not come by one leap or bound, but by progressive steps. We conceived that the plan we proposed was not only an improvement, but a logical step toward the ultimate goal—That if a Master in Chancery were given complete jurisdiction over the taking of depositions, it would serve as much as anything else as an object-lesson to suggest, why should not the Judge himself preside? A competent Master, with controlling jurisdiction, would at once be such an improvement, that every body would be converted and de-

mand the ultimate and essential reform in having the Judge himself to preside.

And the argument in favor of the Judge hearing the testimony is by no means limited to the advantage of having the range and relevancy of the testimony confined to proper bounds, but even more that the Judge should see the witnesses, estimate their intelligence and character, and have a more intelligent estimate of the accuracy and value of the testimony than is possible from reading depositions. Moreover, (if we may be permitted to utter a secret softly) the Judge does not read all the depositions, and on an average gives but a very superficial reading in any case, to a big batch of depositions. His judicial stomach would turn turtle at many a batch of depositions if he had to read them carefully—and he does not need to make a confession of this in open court—So goes the opinion at the trial table.

The situation is this: the members of the bar, the Judges, and the suitors in our courts, recognize without exception so far as we know, that the existing method of taking depositions in Chancery is inexcusably defective; it is a frequent cause of the failure of justice in our courts; and it is the most unpalatable part of the lawyer's work.

If it cannot be reformed, Why not?

If the Bar of the State asks for a reform will it not be granted?

Why should not the State Bar Association agree on a definite plan, formulate a bill and go before the next Legislature with it?

If the bar of the State is not sufficiently interested in this matter to make a move, we assume that the public will be content to let it rest till dooms-day.

“Lawyers have grand reputations for energy and perseverance. A lad said to his father one day:

“‘Father, do lawyers tell the truth?’

“‘Yes, my boy,’ the father answered, ‘Lawyers will do anything to win a case.’”

Justice Hughes

There seems to be universal commendation, among both lawyers and laymen, of the appointment of Gov. Hughes to the U. S. Supreme Bench.

We are glad to believe that there has been no responsibility of the great office of President borne more seriously by Mr. Taft than the selection of members of this high tribunal. For the same reason we are glad that a number of vacancies, since they must occur, will probably occur during Mr. Taft's term.

The country will take Mr. Taft's conscientious judgment on this difficult and delicate matter, even if the appointment were not altogether satisfactory. But in the case of Gov. Hughes there appears to be no dissent from any quarter.

Some of the reasons, however, which have furnished the grounds of satisfaction with the appointment of Gov. Hughes, in the comments of different law journals, we would not expect to find there.

The editor of *Case and Comment* thinks it "would be unfortunate, indeed, if the Supreme Court were made up of men notable only for their deep knowledge of law."

It would seem that the editor would make a "deep knowledge of law" secondary to being a wise man of the world. If that is the view, and it is among a certain class, it seems to us that it is about as consistent as it would be to select a man to repair your watch who knew but little about watches if he was only a man of wide experience and broad culture generally.

We believe that it is next to impossible for a great lawyer to be other than a man of broad culture yet we would make the first requisite of his qualification for the high office of a Supreme Justice that he was "notable for his deep knowledge of the law."

A Mensa et Thoro.—Lawyer—"Am I to understand that your wife left your bed and board?"

Uncle Ephraim—"Not 'xactly, boss. She dun tuk mah bed an' bo'd along with her."—Puck.

Begin at the Bottom

While judicial reform is the Slogan from the Atlantic to the Pacific, why not begin with the Justice?

Probably it is a misnomer to speak of reforming the Justice System, for there is not enough judicial material in the whole institution out of which to construct a respectable judicial tribunal.

What a travesty on a government of law it is to say that a man who knows no law, who has had no opportunity to know the law, who has no disposition to acquire knowledge of the law, and who has no capacity to understand or appreciate the law,—that such a man shall be set up in every community to administer the law, and to represent the dignity of the law, and dispense justice according to law between man and man!

The fact is that the justice does not administer the law, but nevertheless in the name of the law dispenses a crude, and often monstrous personal authority over the rights and property of citizens that brings the law into contempt and that in almost every instance makes a suitor an enemy of the law and sows the seed of anarchy that will some day bring forth fruit.

It cannot be otherwise than that if any arm of our judicial system shall disgrace itself the whole system will partake more or less of the besmirchment.

In five districts out of ten—to be conservative—this travesty on the administration of law is being enacted day by day, and is the perennial subject of jest among laymen; while in fact and in truth it is a serious and ever growing menace to the perpetuity of republican government.

Every day our amazement at the general tolerance of the legal profession grows apace, but our amazement at the special tolerance of the profession toward the Justice System has grown beyond expression.

The stock excuse for its existence, that the people need a convenient and simple tribunal to dispose of minor business disputes, and speedy process in criminal matters, does not ex-

cuse the existence of such a system as the Justices' Court. It may have suited a primitive people and a primitive period out of which it grew, but it is a blotch on our present day civilization. There is only one way of reforming it, and that is to wipe it off the slate.

The Artificial in Our Business System

There was probably no President since Washington who opened up a broader and more vital issue for the American people than did Pres. Roosevelt when he made the elimination of dishonesty and corruption from our business methods the essential question of the time.

The President or the Statesman who will now arouse this popular sense to an appreciation of the insidious evils of the *artificial in our business methods*, as Roosevelt did of its dishonest methods, will be entitled to not less honor.

As the Roosevelt campaign uncovered to the gaze of the nation a surprizing and seething mass of corruption that was eating into the very vitals of our national life; so will the nation awake to the not less menacing effect to our stability and national prosperity, when it realizes that the artificial in our business methods has about eliminated and put aside the natural laws of trade and commerce which have been demonstrated to be fundamental since the organization of society. As, for instance, that combinations shall be substituted for competition; combinations shall regulate the supply no matter what the demand; combinations shall determine the buying prices and the selling prices; combinations shall take the place of individual experience and talent in business; combinations shall put the numskull and the genius in business on an equality; combinations shall discount the individual skill, experience, industry and foresight in all lines of business, put all men on an equality, and thus deprive all men of either the necessity or the rewards of business initiative or enterprise.

In the history of human society that has always been a costly campaign that undertakes to beat nature.

The whole population of the country is feeling the sting of this unnatural situation in the high cost of the necessities of life. Combinations of manufacturers, producers, wholesalers, retailers, and the entire list of trades are organized against the consumer, he being the only one without organization. One of the committee inquiring into the high cost of the necessities of life, said, the other day, that "all the testimony we have taken proves conclusively that all dealers, traders, manufacturers, &c., are either thoroughly organized or are in the process of organization."

The individual man who has scant capital enough to stock a store-room with goods, needs only to join the "Combine," and it will tell him how to buy and how to sell. He needs no business experience. The man of business ability is out of a job. Combination has relegated competition to the rear.

Some Late Workings of the Doctrine of Public Policy, on the Bench

The evils of this prolific subject have never been better expressed and more tersely summarized than in the subjoined article by a member of the Maryland Bar, written for the last number of *The Docket*.

It is possible that it has already come under the eye of many readers of *The Bar*, but we take the liberty of here reproducing it because it is a most valuable contribution to the general discussion, and rings true in every sentence.

We commend its careful reading to those members of the Bench who have avowedly accepted and adopted this "new religion," of the judiciary and are dispensing it in more or less heroic doses. To a man of open mind this statement of the case ought to be conclusive, for it is unanswerable:

"The Doctrine of Public Policy bears about the relation to the law that the vermiform appendix does to the body—a vestigial doctrine having little function but to start trouble.

The essence of the doctrine, so far as formulated, seems to be that a judge should not simply pass upon the rights of the parties before him, but should be considering also how his decision will affect the public, or how it will be looked at by it.

Lord Chief Justice Wilmot, an earnest believer in the doctrine, puts it in these words: "It is the duty of all courts of justice to keep their eye steadily upon the interest of the public even in the administration of commutative justice."

In other words, the judge is to have one eye on the rights of the parties and one eye on the public—strabismus, of course, inevitable.

Greenhood, on Public Policy, states the doctrine thus:

Rule II—"But if such contract bind the maker to do something opposed to the public policy of the state or nation, or conflicts with the wants, interests or prevailing sentiment of the people, or our obligations to the world, or is repugnant to the morals of the times, it is void, however, solemnly the same may be made."

This would seem to be a broad charter. The most dangerous working of the principle, however, has not been where it has openly invoked, but where it has been the silent inspiration of the court's action.

It is a severe restraint often, upon the judicial temperament, to confine itself to passing upon the rights of individuals as governed by what Baron Alderson called "fixed rules and settled precedents." The temptation is strong to round out one's usefulness by the appropriation of a little of the legislative power, inject a high morality into the law, to help it along out of one's own individual wisdom. It has always been easier to be a great moral teacher than to keep to one's limited duty, and Bottom was not the only actor who wanted to play other people's parts.

The doctrine of public policy is the product partly of this

ingrained human tendency, partly of the persistence of the idea, disowned by our Constitution, but never really eradicated from the popular mind, that the judicial function is but a form of the legislative.

Eminent jurists have looked with disfavor upon the doctrine of public policy, and have suggested limitations that would practically substitute for it a few definite rules. Some of them have treated it as not so much a rule of legal action as a chance for the judge to indulge his individual bent, one of them making the inquiry: "Public policy? Whose?"

When a judge leaves the fixed rules and settled precedents to moulder around among notions of general morality, "tendencies to be encouraged" and "tendencies to be discouraged," he has abandoned a steadying and sustaining influence to lean too heavily upon his own human character. He might well when so tempted profit from the case of Sir Andrew Aguecheek, who "sometimes thought he had no more wit than an ordinary man."

I have used the expression "public policy" to denote a persistent tendency in the popular mind, in other words, in the human mind, to regard the judicial function as ancillary to the legislative and executive, working out any result desirable or greatly desired at the time. This feeling is older than our legal system—as old as human nature. It is the perennial enemy of the pure law.

An established right in the individual is a limitation upon the power of the majority. People are willing to leave an individual his rights so long as they have no value. When they assume a value, the tendency is to appropriate them. So far as the law has endeavored to curb this tendency, it has had a hard fight. That the individual should have any rights as against the public interest, as against the state or the government is a modern conception. It would have been inconceivable to many of the best men of an earlier day.

The feeling, lurking, persistent, often unconscious, that the rights of the individual must give way when there is any strong public interest opposed to them, governs the decisions of many

of our judges. An interesting example of this tendency is found in the disposition of some of our courts to get rid of the constitutional limitations of our organic law by elastic definitions of the policy power.

The curbing tendency to ignore the rights of the individual was a prime object of those who framed our Constitution. The constitutional limitations which they embodied therein are limitations which the people have set to their own hasty use of power. The people in their calmer mood set limits upon what the majority may do to the individual. The principle upon which they were framed is finely stated by Mr. Justice Brewer in his address to the graduating class of the Yale Law School in 1891.

"The wisdom of government is not in protecting power, but weakness; not so much in sustaining the rules, as in securing the rights of the ruled. The true end of government is protection to the individual; the majority can take care of itself."

Set up as a defense of the individual against the majority the constitutional limitations have had a steady fight with the old tendency. The old bottles would not hold the new wine. That the omnipotent people, state, government, should not be able to do a good thing when they wanted to do it, because of the rights of an individual, is as foreign to the idea of government held by many of our public men, and some of our judges, as it would have been to Peter the Great. They could respect the limitations of our Constitution, if each had appended to it the words "except when the public interest is otherwise," or "except when public opinion is the other way," in other words, if they were not limitations at all. The fine expression I have quoted from Justice Brewer does not appeal to them. Their idea would be expressed somewhat thus:

"It is a weak government that admits limitations upon its own power. It is dangerous to take away from the powers of the government in the interest of an individual."

The persistent old tendency works its way out by taking a large, we might say exaggerated, view of what is called the police power, "that power by which state provides for the public

health and public morals and promotes the general welfare." By making this broad enough we can get rid of the constitutional limitations altogether.

Another illustration of the tendency that I am speaking of is found in the attitude of ex-President Roosevelt towards the law. Public men of the type of Roosevelt and Lord Brougham derive much of their usefulness from their innate lawless disposition, and always leave us balancing the direct good accomplished by their reforms against the evil by-product of the precedents they set.

Mr. Roosevelt invoked that ground of public policy enumerated by Greenwood, "the prevailing sentiment of the people." He brought it to bear upon Congress, he used it to arm the Executive with new powers, and he thought that he was entitled to have it recognized in the administration of the law. Mr. Roosevelt's attitude towards the law was a most spectacular illustration of the persistence of the old belief that the administration of the law is but a branch of the executive and legislative functions, and should yield to public policy or the popular opinion of the time.

Baron Parke rather broadly suggested that action based upon public policy naturally drifts into action based upon the individual views of the judge. He says that in its ordinary sense it means "political expedience." We have had an illustration of this upon a large scale.

If the courts are to be influenced by what Greenwood calls "the prevailing sentiment of the people," how far shall they go? How quickly responsive shall they be to this influence? In other words, where does the doctrine of public policy leave off, the yielding to clamor or "playing to the gallery" begin? Shall we defer only to a long-continued public opinion, or act promptly on its freshest forms? In my opinion, it is only a difference of degree, and the judge who allows himself to be led away from his grand, though simple, function, by consideration either of general morality, the public interest, or public opinion, is only

weakening himself against the day when he may have to face popular clamor or resist political influence.

Mrs. Surratt and others were tried when public opinion was high. The Judge Advocate General, over the protest of eminent counsel, hurried the proceedings forward, stating that public opinion demanded a speedy trial. Richard Merrick, of this State, exclaimed: "When we pass the doors of a court room we enter a realm where public opinion has no place." Public opinion, however, got in. Two people—one a woman—were convicted and suffered without evidence

Are these convictions to be credited to the working of this doctrine? I am not sure. I am sure that the strongest safeguard we can have against the recurrence of the judicial outrages that have disgraced our history in times of excitement, and may do so again, is the maintenance in the minds of judges, the strengthening in the administration of which the judge shall be deaf to popular opinion and powerless to carry out his own views of general morality, "political expedience," or the public interest.

A proper view of the law's scope will be more valuable to this people than perfection in the law's character.

A SHAPELY COMPLIMENT.

The late Chief Justice Chase was noted for his gallantry. While on a visit to the South, shortly after the war, he was introduced to a very beautiful woman, who prided herself upon her devotion to the "lost cause." Anxious that the chief justice should know her sentiments, she remarked, as she gave him her hand. "Mr. Chase, you see before you a rebel who has not been reconstructed."

"Madam," he replied, with a profound bow, "reconstruction in your case would be blasphemous."—Everybody's Magazine.

"The patriotism of peace is just as necessary as the patriotism of war. The patriotism of the ballot is even more necessary in a free country than the patriotism of the bullet."

Judicial Reforms

Depositions in Chancery

To The Bar:

This subject was presented for consideration through an article published in the April number of this magazine. In that article it was suggested that, with regard to the taking of depositions in chancery proceedings, it might be well for masters in chancery to be appointed who should act in the taking of depositions in equity proceedings and have the right to pass on the admission or exclusion of evidence and the extent of the testimony which should be subject to the review of the judge of the circuit court.

It has long been the practice for the court to refer to a commissioner a suit in equity involving matters requiring special and elaborate investigations, such as the account of a trustee who has had trust funds in his hands, and the nature of his reports and accounts. When the facts relating to a matter of this kind are presented to the commissioner he goes over them with care and particularity and returns a report setting forth the conclusion which he has arrived at with reference to the commissioner's report and the case is then submitted to the court for final determination, the work of the court can be done much more easily and speedily than if the court had been compelled to go over all of the details, and in this manner the final determination of the case is reached more quickly and more satisfactorily. In such a case there are usually many details which must be carefully examined into by the commissioner with respect to which there is no controversy. The commissioner must go into an investigation of these details for the reason that they are part of the general result which he must reach in his report and are necessarily connected with those matters about which controversies arise. The court, when the case is submitted to it for final decision, is relieved from a large amount of the work which would be otherwise imposed upon it. Under such circum-

weakening himself against the day when he may be popular clamor or resist political influence.

Mrs. Surratt and others were tried when was high. The Judge Advocate General, over the consent counsel, hurried the proceedings forward, opinion demanded a speedy trial. Richard State, exclaimed: "When we pass the day we enter a realm where public opinion is opinion, however, got in. Two people—victed and suffered without evidence

Are these convictions to be credited doctrine? I am not sure. I am a guard we can have against the outrages that have disgraced our country and may do so again, is the main the strengthening in the administration be deaf to popular opinion and views of general morality, interest.

A proper view of the this people than perfect

The late Chief Justice adopted which would be the best plan would be in relation While on a visit to the courts which are now usually referred to as introduced to a new system of suits tried before the judge of the her devotion to the same way in which jury trials in actions should know and on. When an equity suit has been matured hand. "My court's terms, then the judge should set this suit reconstrued before him on a specific day and the parties on either "My should be required to have their witnesses present on that tion in zine. The judge could then hear introductory statements from the attorneys, and could then listen to the evidence as presented, and from time to time pass on the admissibility of different features of the evidence just as he does in the trial of a case before the jury. A stenographic record of the evidence would

Depositions in Chancery

Judicial Reforms

THE BAR

usually done in cases tried in court, and this
 ist the judge's memory if he should not be
 ly on the case at once. When the evidence
 d the case could then be argued to the
 decision. A method of this sort would
 is involved in many of the suits in
 depositions are taken at various in-
 nce of one or the other of the
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 and hear the witnesses
 ble to reach a proper
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 various matters
 from the reading
 . If equity suits could
 at in this manner, then they
 conclusion very much more quickly
 in the present method, however care-
 judge may be in his efforts to decide the
 presented to him.

the plan suggested should be adopted by our courts, it
 of course involve the taking of depositions of non-resident
 witnesses who could not be personally brought before the court,
 just as the like method is followed in the trial of cases to the
 jury. This would be merely an incidental matter which would
 not seriously involve the proper trial and consideration of any
 suit presented to the court. Neither would it interfere in any
 way with the manner in which an equity suit might be appealed
 to the Supreme Court and considered and passed on by that
 court.

H. M. R.

"Good men will observe even bad laws, but bad men will
 break even good laws. It should be that all men, good and bad
 be compelled to keep all law, good and bad, because it is the
 law."

THE BAR
 Judicial Reforms
 Cases in Chancery
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Littlefields' Debt Report

To *The Bar*:

(Continued from May Bar.)

The 1,200 page record being distributed it would be public service to scatter Littlefield's report of two hundred pages. A study of this report and record shows that counsel have agreed to facts and figures so that discussion must be restricted to a few questions of law. These questions offer opportunity for judicial legislation.

The debt was thirty-three millions. West Virginia's proportion would, on the basis of white population, one-third: on the basis of total population, 23.56 per cent: on the basis of federal population, 26.30 and, as she separated after legislation about freeing slaves, on the basis of property, 23.41 per cent.

The three expressions, (a), state expenditures within limits; (b), ordinary expenses of state government, and (c), monies paid from counties, had a well defined local meaning and, if given this local meaning then, stating the account will work out about the amount Virginia spent in West Va., counties for roads, bridges, banks, &c. But unfortunately the record is silent about this local meaning and judicial legislation may give these expressions a meaning which will grievously disappoint the intention and expectation of the men who wrote the ordinance.

State Expenditures Within The Limits Thereof. Littlefield, holds, that being tied down by instructions, he must limit the scope of this phrase to roads, &c., built by the state through the agency of a company. Under this ruling the charge will be \$2,800,000. Virginia has excepted. The court is not tied down. The only material question under this head is,—will the court include state expenditures made through the agency of a company. If so, the charge will exceed 5 1-2 millions. Record, p 371.

A just proportion of the ordinary expenses of the state government. This involves, (a), inquiry as to the amount of

these expenses, and (b), inquiry as to the measure which shall determine the proportion which is just.

The amount of ordinary expenses. The court cannot escape taking notice that the ordinance distinguishes between such disbursements as fell under the head of ordinary expenses and such disbursements as did not. Rebuilding the penitentiary when it burnt down was an unusual expense but must be classed among ordinary expense of any state government, beautifying the capitol building was unnecessary but comes clearly within this term. The total disbursements, out of the revenue from taxes, during the 38 years exceeded fifty-seven millions. The Virginia attorneys, intent on speedy decision and omitting items aggregating some sixteen millions which their accountant hesitated to class under this head, put the amount at \$41,194,592. Littlefield's finding puts it at \$40,274,896.

West Virginia's exceptions cover four items; to-wit: (a) The interest charge. She admits that Virginia paid \$18,547,747 of interest on her bonds during the 38 years, but contends that interest was not an ordinary expense. Of this presently. (b), Primary schools. Amount \$2,400,321, of which \$830,865 went to West Virginia counties. Ancient Virginia general law dedicated certain revenue from capitations, fines, escheats, &c. This revenue accumulated, along with private donations and dividends on stocks, purchased with appropriations to education, in an account called the literary fund. It was similar to our irreducible school fund. The net income was distributed annually to counties according to white population. West Virginia agrees that disbursements to schools was an ordinary expense. Her exception to allowing this \$2,400,000 stands on the naked proposition that it should not be classed among ordinary expenses because, and only because, paid out of the income from a fund which had accumulated before 1823. Record p, 569. Littlefield's brief discussion of this proposition indicates that he supposed the objection was merely pro forma. It seems safe to assume that the court will either over-rule this exception, or, what will be worse, add he \$830,865 to the amount charged under

state expenditures within limits. (c and d.) Calling out the militia. It was called out at Wheeling against Indians in 1836. (Rec p 222), and against John Brown in 1859. It will be difficult to find in law books a principle distinguishing rebuilding a penitentiary from calling out the militia. Child-birth is not an annual expense, but experience brings it within the category of ordinary. The remaining exceptions, other than to interest, involve less than \$400,000 and, sustaining all of them, could not change the result as much as \$80,000! Hence the question is narrowed to whether ordinary shall mean only such disbursements as were strictly necessary and essential as well as customary. In this connection, observe, that, if the exceptions filed by Virginia are sustained, the court must increase Littlefield's forty millions to forty-five millions.

Littlefield says he "thinks it reasonably settled by the authorities that the term, ordinary expenses, is not fixed and definite but is more or less flexible and varying in its meaning. If, as used in the decree, it is of doubtful meaning and open to two constructions, one of which would produce an equitable result, the reading, with the decree, of the constitution requiring the assumption of an equitable proportion would require the doubt to be resolved in favor of the equitable result." In other words, if, (in the unexpressed and unjudicial conjecture of the court) one-third would be equitable, then such a meaning should be given to the word "ordinary" as will swell the amount for ordinary expenses so as to bring West Va., in debt for eleven millions.

In truth, the real question wrapped up in this question about the amount of ordinary expenses is,—whether the court will come to the task, of, interpreting the three expressions, animated by the desire to punish a wicked criminal? In other words, will the court discover a concealed intent and find such meanings for the three expressions as will bring West Virginia in debt for an amount which, in the legislative discretion of the court, would be her equitable share if the ordinance was silent

about stating an account. And here lies the state's danger. It is a danger which cannot be exaggerated.

The interest charge. Littlefield includes the eighteen millions among ordinary expenses. West Va., has excepted. His exhaustive review of decisions shows that he is right unless the expression had a local meaning which excluded interest. His ruling should have been different if the record exhibited that, in Virginia, interest was not classed among ordinary expenses.

Again, nearly five-sixths of this interest was paid on bonds representing roads &c., in Virginia. Hence, West Virginia's just proportion of it ought not to be determined by the same measure which determines her proportion of the ordinary expenses of government. If the record exhibited separately the amount of interest paid on account of expenditures in each section, then it could be argued with great force that, as only one-sixth of this interest was on account of expenditures within her limits, West Virginia's just proportion was only 16 2-3 per cent of the 18 millions although the just proportion of the other 22 millions of ordinary expenses, (measured by federal populations) was 26 per cent. But the record being silent as to the amount of interest paid on account of each section, the court must either apply the same measure to both sorts of ordinary expenses, or else exempt West Va., from all interest on bonds representing her own roads. But the court will never exempt her. Littlefield doubtless had something like this in his mind when he said, (page 110 of his report), "Unless allowed as an ordinary expense, West Virginia will not pay any part of the interest."

A just proportion. Suppose the ordinance read;—
Whereas this convention, representing entire Virginia, consents that Western counties may separate, and whereas Virginia owes 33 millions, borrowed to build roads and start banks, and whereas this convention thinks it likely that each year, for the last forty years, said western counties overpaid their just share of the cost of state government, therefore it is enacted that, in lieu of her part of the debt, West

Virginia shall pay to Virginia such an amount as shall be fixed by charging all state expenditures within the limits thereof, and a just proportion of the ordinary expenses of the state government, and crediting the monies from said counties.

Does any one doubt that, if the ordinance so read, her just proportion of ordinary expenses ought to be ascertained without reference to the amount of Virginia's debt, and without reference either to the amount of state expenditures or the amount of monies paid? The amount of her just proportion of ordinary expenses is the same no matter what the amount of state expenditures within limits.

Again, if the ordinance so read, does any one doubt that her proportion of ordinary expenses in 1823 ought to be determined by the relative ability of the two sections in that year, and not by their relative ability forty years subsequent? But strange to say, Littlefield was instructed, on West Virginia's motion, to ascertain her relative ability forty years subsequent:— he was instructed to report the relative wealth of the two sections at the time of separation; viz: after the legislation making slaves free.

It is imperative to keep clearly in mind the difference between a just proportion of ordinary expenses, and a just proportion of the 33 million debt. The legal effects of the ordinance is the same as if it said;—"an equitable proportion of the 33 millions shall be the amount ascertained by stating the prescribed account." It subverts the fundamentals to say that the account shall be so stated as will, in the benevolent, (or malevolent,) opinion of the court, be an equitable result. The court has judicial right to adjudge the Wheeling convention was an illegal body but, if legal, it had power to acquit West Va., of any duty on account of the debt. The circumstances that, in the court's opinion, it abused its power and assigned to west Virginia too little, is no ground for intervention,—unless the court acts on a theory which none dare put in print; to-wit, on the theory that it acts as the *custos morum* of the states.

It may be assumed that the court will hold that, as matter of settled law, the just proportion depends of relative ability. But does ability depend on relative wealth or on relative population? This question rivets attention on the fact that ability to "pay" a debt depends on the value of a man's property; ability to "carry" a debt depends on his income. The owner of a \$50,000 diamond may have less income than the owner of a \$5,000 farm, and the state's ordinary expenses were necessarily regulated by contemporaneous revenue. Hence the court, taking judicial notice that slaves were producers of income as well as property, may hold that the relative ability of the two sections, ninety years ago, will be ascertained with greater accuracy by measuring by relative federal populations than by measuring by relative property. If it be suggested that a plow-horse produced income, the answer is that our political system was based on determining representation by adding 3-5 of slaves to whites. And this matter has been gone into to emphasize the fact that it is almost certain the court will measure the just proportion of 40 millions of ordinary expenses by federal populations. Rec., p 517 gives the population; p 515 gives the expenses for each decade. Making this charge \$8,527,640.

A reprint of page 22 May Bar will be mailed on request.

Address.

J. M. MASON,

Charles Town, W. Va.

Respectfully Referred to the Legislature

June 22, 1910.

Editor of The Bar, Morgantown, W. Va.

Dear Sir:—

How does *The Bar* construe section 16 of chapter 51 of the Code as amended by chapter 46 of the Acts of 1909, this being the new provision requiring that "the official *signature* of any notary shall state the date of expiration of his commission."

Paragraph third of section 17 of chapter 13 of the Code

provides that "The words 'written' or 'in writing' include any representation of the words, letters or figures, whether by printing, engraving, writing or otherwise. But when the *signature* of any person is required it must be in his own proper handwriting, or his mark attested, proved or acknowledged."

Since the signature must be in the notary's own proper handwriting, and since the official signature must state the date of expiration of the commission, would it not seem that this date ought to be given in the notary's own handwriting? It can fairly be said that the words "My commission expires" need not be in the notary's handwriting, as they are useful only to show what the date refers to, and are adopted by the notary for that purpose just as a printed scroll can be adopted as a seal. The writer has not supposed that the certificate as to the date of expiration was a part of the official signature of the notary. Our statute now makes it such, and possibly should be so construed as to make the words "notary public of, in and for ——— county, West Virginia," (or similar words following the notary's name,) a part of the official signature so that these words also should appear in the handwriting of the notary.

Shall we accept as sufficient the certificate of a notary who uses a rubber stamp to show the date when his commission expires? Or, if we conclude that at least this date must appear in the notary's own handwriting, is there anything else which must so appear, in addition to the name of the notary?

The law does not seem to have been carefully drawn, and perhaps it should be re-enacted to settle the questions above stated.

Yours truly,
Ohio County.

WANTED—By an energetic young stenographer, who is a graduate in law and a member of the bar of another state, a position in some reputable West Virginia Lawyers' office where he may review for the West Virginia Bar Examinations. Best of References given.

Address **TWAIN**,

2110 Warren Avenue, Chicago, Ill.

West Virginia Court of Appeals

Decisions Handed Down at the Last Term

REPORTED ESPECIALLY FOR THE BAR

Appearing Here for the First Time in Print Reforming the Law and the Courts

STATE v. ARBRUZINO.

Harrison County. Affirmed.

Williams, Judge.

SYLLABUS.

1. If the error complained of be, that the final judgment is in excess of the verdict, it is matter of record and may be reviewed on writ of error, without any formal exception being taken to the action of the trial court. In such case it is not necessary that a motion to set aside the verdict should have been overruled, and an exception taken in order to entitle the party complaining to a writ of error.

2. The verdict of a jury in a criminal case should be read in connection with the indictment, and, if the meaning of the verdict is thus made certain, it is sufficiently definite.

3. Upon an indictment for feloniously, maliciously and unlawfully beating and wounding, with a dangerous weapon called a club, with intent to maim, disfigure, disable and kill, the jury returned the following verdict: "We, the jury, find the defendant, Tonio Arbruzino not guilty of the felonious and malicious assault charged in the within indictment with the intent therein charged, but we do find him guilty of the unlawful assault therein charged with the intent therein also charged."

HELD. That the word "assault" in the verdict refers to the beating and wounding charged in the indictment, and does not mean the technical and common law offense of assault.

PICKENS ET AL. v. STOUT ET AL.

Lewis County. Reversed in part; affirmed in part; and Remanded.

Poffenbarger, Judge.

SYLLABUS.

1. The defense of an ouster between tenants in common, effected by the possession of a stranger under a contract of purchase from one of the co-tenants, does not present a question of title of which a court of equity cannot take cognizance on a bill for partition of the land.

2. A married woman cannot divest herself of legal or equitable title to land, otherwise than by a deed or contract, acknowledged in the manner prescribed by the statute.

3. To sustain a demand in equity for specific performance of an oral contract of purchase of land, the evidence must be clear, full and free from suspicion.

4. To be enforceable in equity a contract of purchase of land must be complete, fixing the price and terms as well as the identity of the land.

5. An ouster between joint tenants, tenants in common or coparceners may be effected by open, notorious and exclusive possession of the land by a stranger, under a deed or an executory contract of sale, executed by one of the co-tenants to such stranger, purporting to convey or sell the whole thereof to the latter.

6. Mere execution and delivery of such deed or contract is not of itself sufficient to work an ouster. To it there must be added express actual notice of the adverse claim and possession, or open notorious, exclusive and hostile possession of the land by the grantee or vendee of which the true owner in co-tenancy must take notice, and inquire by what right such dominion is exercised.

7. If, when such vendee secures his deed or contract, a tenant is in possession of the land, holding under the true owner, and continues to remain thereon, under an agreement of attornment to the purchaser, of which any true owner has no notice, the possession of the vendee by such tenant is not adverse to such owner; but his possession becomes adverse from the date of the removal of such tenant from the land, if he himself openly uses it or substitutes new tenants thereon.

8. In such case, the ouster is effected by the combined action of the vendor, but, in law, the vendor may be regarded as the real actor and the title under which the estate was held in common as his color of title, of which the vendee may avail himself as a claimant under it.

9. When all the parties to the suit for partition claim title from a common source, title in such common source is conclusively presumed for the purpose of the suit, though no deed or other muniment of such title has been introduced as evidence or is known to exist.

10. The running of the statute of limitations against a person is not interrupted by his death, and continues to run against his heirs, though they be infants, and, in such case, the heirs are not within the saving clause of said statute.

11. The disability of infancy at the date of the accrual of a right of action must be shown by the party claiming the benefit thereof. To prevent the bar of the statute of limitations, an infant must show that the right of action accrued to him while he was under such disability, and, therefore, that it did not begin to run against his ancestor, if he claims the property in controversy by inheritance.

12. The disability of infancy on the part of one or more tenants in common or co-perceners, does not avail their co-tenants who, though one under the like disability, have failed to sue for the recovery of their interests in the land within five years after the attainment of their respective majorities. Each is barred by the lapse of said period.

13. A disclaimer, filed by an heir to an estate, in a suit for partition of the real estate of the ancestor, acknowledging advancements to the extent of his full share of the estate in the life time of the latter, followed by a voluntary partition of a portion of the land in which those participating in it apportioned, assumed and paid indebtedness of the estate, precludes such heirs and assigns from participating in the subsequent partition of the residue of the lands.

HOGG v. MCGUFFIN

Mercer County. Decree Reversed.

Brannon, Judge.

SYLLABUS.

1. Equity will decree specific performance of a contract for exchange of shares of stock in corporations when legal remedy is not adequate because the stock sought is of special and peculiar value, or is not readily purchasable in the market, or has no certain ascertainable value, or a money judgment against the party would be worthless because of his insolvency, or other circumstances in the case calling for specific performance as the only adequate relief.

2. If one is entitled to have specific performance of a contract for exchange of stock in corporations, and one of the parties transfer to an innocent purchaser the stock which he is to transfer in exchange, equity will give the other party to the contract a charge or lien upon the purchase money yet in the hands of such purchaser.

STATE v. MARTIN.

Braxton County. Writ of Error Dismissed.

Miller Judge.

1. A writ of error does not lie from this court to the judgment or order of the circuit court in a criminal case setting aside the verdict of the jury and awarding a new trial. Re-affirming *State v. Bluefield Drug Co.*, 41 W. Va. 638.

CASTELMAN'S ADMINISTRATOR v. CASTLEMAN ET ALS.

Jefferson County. Reversed and proper decree entered here.

Miller, Judge.

1. If commissioners authorized by a court decree to make sale of land decreed to be sold, undertake without specific authority given to sell the land by the acre, and the sale is so reported to and confirmed by the court, such confirmation will cure any irregularities of the commissioners in making such sale, and if by mistake resulting from the actions of court and commissioners less land be sold than was bid for and supposed to be sold the purchaser will be entitled to a proportionate abatement of the purchase money.

2. Such relief may be obtained by the purchaser upon petition filed in the cause, by way of defense on a rule to show cause why the land should not be resold to pay the balance of purchase money, or by way of defense when sued on the purchase money notes or by any other appropriate remedy.

3. The rule caveat emptor does not apply to mistakes in the quantity of land sold by the acre at a judicial sale, as it does to defects of title.

4. Nor as a general rule will the rule of laches be applied to a purchaser at such judicial sale, if no equities have intervened and the rights of no one will be injuriously effected by a proportionate abatement of the purchase money, so long at least as the purchaser still retains in his hands unpaid sufficient of the purchase money out of which such abatement can be made.

5. The arbitrary rule of allowing five per cent to cover inaccuracies reasonably imputable to variations of instruments and small errors in surveys, referred to in *W. M. & M. Co. v. Peytona C. C. Co.*, 8 W. Va. 406, 437, and recognized in *Pratt v. Bowman*, 37 W. Va. 715, 721, is inapplicable to sale by the acre of valuable farming lands. In such cases only such allowance should be made as, considering the inequality of the ground and other obstacles hindering an accurate survey, may reasonably be imputable to such variations of instruments and small errors in surveys.

DUNBAR v. DUNBAR.

Raleigh County. Decree Reversed.

Brannon, Judge.

SYLLABUS.

1. The limitation for a bill of review from a decree made before Chapter 40, Acts of 1909 took effect, reducing the limitation to one year, is three years.

2. In a suit in equity to enforce a lien for purchase money reserved in a conveyance of land, persons not parties to the conveyance, between whom and its parties there is no equity, and who claim title adversary to that of the parties to such conveyance, cannot be made parties to such suit, and their rights cannot be adjudicated against them in it.

NORVELL v. KANAWHA & MICHIGAN RAILWAY CO.

Mason County. Reversed; verdict set aside; new trial granted.

Robinson, President.

1. It is negligence in a passenger, under ordinary circumstances, to stand upon an open platform of a rapidly moving railroad car. If one voluntarily and unnecessarily takes such position and is injured in it he cannot recover damages.

2. To ride on a car platform is not always a negligent act. If the train is so crowded that one cannot reasonably enter a car, it is not negligent to ride on the platform when the carrier acquiesces in the use of such accommodations by collecting fare for the same or some other indicative act.

3. The carrier owes to the passenger unvoluntarily, necessarily and rightfully riding on the platform the high degree of care commensurate with the circumstances and its act in undertaking to carry him there.

4. Injury to a passenger while excusably riding on the platform because of the overcrowding of the train usually constitutes a *prima facie* case of negligence on the part of the carrier.

5. The liability of the carrier to one excusably riding on the platform is not absolute. If it used reasonable diligence to provide cars for his safe carriage, and, with fair excuse for failing to provide them, exercised the increased care demanded by the passenger's enforced position on the platform, it is not liable for injury to him.

6. If a railroad company negligently and unreasonably fails to provide sufficient cars so that passengers are compelled to ride on the platforms and then accepts passengers for carriage in such hazardous places, it is liable for damages to one injured therein, unless he has contributed to the injury by negligence on his part.

7. The conductor of the train represents the railroad company in relation to the transportation of passengers on his train, and his acts in receiving and carrying passengers on the platforms when the train is overcrowded binds the company.

8. The court cannot properly direct a verdict in a case turning on a conflict of evidence which makes the material facts so doubtful that a verdict for either party would be sustained.

9. A written release or acquittance of a claim for personal injury will not sustain a plea of accord and satisfaction in the premises if its execution was obtained by deception and fraud.

STATE v. BARKLEY.

Jackson County. Judgment Reversed.

Brannon, Judge.

SYLLABUS.

For syllabus see *State v. Miller*, 66 W. Va. 426, 66 S. E. 522.

STATE v. GIBSON.

Pocahontas County. Judgment reversed, Verdict Set Aside and Case Remanded.

Poffenbarger, Judge.

SYLLABUS.

1. An indictment for malicious cutting and wounding, with intent to maim, disfigure and kill, need not specify the instrument with which the injury was inflicted.

2. To constitute a wound, within the meaning of Sec. 9, Ch. 144, Code 1906, an injury must have been inflicted with a weapon, other than any of those with which the human body is provided by nature, and must include a complete parting or solution of the external skin.

3. Though said statute makes it a felony for a person maliciously to cause another bodily injury by any means, with intent to maim, disfigure or kill him, an indictment, charging only malicious cutting and wounding with such intent, is not broad enough to let in proof of such injury, inflicted otherwise than by cutting and wounding.

4. An indictment for maliciously or unlawfully causing bodily injury otherwise than by shooting, stabbing, cutting or wounding should specify the means by which the injury was caused.

5. The presumption of the continuance of a fact or state of things, shown to exist, applies to a record, showing the presence of a prisoner in court at the commencement of each day's proceedings in the trial.

6. Admission of hearsay evidence without objection and exception, affords no ground for complaint in the appellate court.

7. Erring in sustaining an objection to a proper question is cured by admitting an answer to another question, covering the same subject matter.

STATE v. YOE.

McDowell County. Affirmed.

Poffenbarger, Judge.

1. An order in a criminal case, reciting an appearance by the prisoner in discharge of his recognizance and an announcement of his readiness for trial, suffices to show his presence in court in his own proper person at the trial.

2. The clause of section 14 of Article III of the Constitution, providing that, in the trial of criminal cases, the accused, "shall have the assistance of counsel," is permissive and conditional upon the pleasure of the accused, in its application to the conduct of the trial; and, to make a conviction valid, the record need not affirmatively show the prisoner had the assistance of counsel.

3. Though bills of exception be settled and signed in due time, they are not parts of the record, unless made so by a certificate or an order, entered upon the record.

KATZENSTEIN v. PRAGER ET AL.

(Two Appeals.)

Wood County. Dismissed; Improvidently Awarded.

Robinson, President.

SYLLABUS.

1. When a bill specifically assails rights claimed by a defendant who is summoned or enters an appearance in the suit recognizing the jurisdiction of the court, he must make direct defense by plea or answer if he would prevent decree against him on the bill taken for confessed.

2. In a suit for a settlement and distribution of the assets of an insolvent firm, though the bill makes no allegations affecting the claim of a creditor who is made defendant and appears thereto, if he does not in some way present his claim for adjudication, or does not meet the bill by plea or answer, a decree in the cause will be one upon the bill taken for confessed as to him.

3. A mere suggestion to the court by a defendant that his rights are involved in another pending cause will not alone suffice to prevent decree against him upon the bill taken for confessed. If he would rely upon the dependency of the other cause as a defense to the bill, he must plead it in such a way as to show that it is a bar, or that the other cause has priority of jurisdiction.

JACKSON, ET AL. v. DULANEY, ET AL.

Wetzel County—Affirmed.

Miller, Judge.

SYLLABUS.

1. The legal effect of a provision in a deed excepting and reserving out of and from the grant at all times thereafter and forever unto the grantor, his heirs and assigns, one-tenth of all the mineral oil that may be obtained by the grantee, his heirs and assigns from the land granted, to be delivered on the land to the grantor, his heirs or barrels or other means of transportation, is to except and reserve in barrels or other means of transportation, is to except and reserve in such grantor, his heirs and assigns, to be delivered as stipulated, a royalty of one-tenth of all the oil produced, possessing the same quality of estate as royalty reserved in an ordinary lease for oil and gas purposes.

2. If the owner of the land subject to such an exception and reservation, lease the same for oil and gas reserving a one-tenth royalty, without stipulating how the one-tenth of all the oil reserved in such prior grant is to be discharged, his lessee will be entitled to deduct the same from the one-eighth royalty oil reserved in the lease. Affirming prior decisions involving the same proposition.

JACOBS v. WILLIAMS.

Raleigh County. Judgment for Defendant reversed, verdict reinstated and judgment for plaintiff.

Poffenbarger, Judge.

SYLLABUS.

1. A notice of intention to insist upon the hearing of a cause, at a certain term of the appellate court, at a place outside of the grand division to which the cause belongs, and to ask that it be placed in the argument list and set for hearing at said term, is sufficient.

2. An appeal bond need not be acknowledged by the obligors.

3. To enable a judge to sign and certify bills of exception in vacation, within thirty days after adjournment, it is not necessary to reserve right to do so by an order, entered of record.

4. Intervention of a special term in the thirty day period, allowed for taking bills of exception after adjournment, does not shorten said period nor deprive the court or judge of power to allow such bills. Within said period, they may be allowed either in court or in vacation.

5. In an action for assault and battery, evidence of loss or damage from interruption to a particular vocation or calling under a contract with a certain employer, is admissible under a general charge in the declaration, that the injuries inflicted upon the plaintiff prevented him from transacting his necessary affairs and business, in the absence of a demand for a bill of particulars, specifying the character of the vocation or employment and the nature and extent of the loss.

6. An applicant for a new trial, on the ground of after discovered evidence, must clearly show his lack of knowledge of such evidence before the trial and diligence to obtain such knowledge and the evidence itself. He must set forth the facts, showing his lack of such knowledge, his efforts to obtain it and what prevented him from so doing, and leave it to the court to say, from the facts stated, whether he had such knowledge or used due diligence to obtain it.

7. On an application for a new trial, to admit after discovered evidence, the affidavit of the new witness, showing what he will testify to, must be produced, or a good excuse shown for its absence.

WALKER v. MAY.

Cabell County. Affirmed.

Miller, Judge.

SYLLABUS.

1. If good grounds for the continuance of a cause be known to a party, or his counsel, before trial, and no continuance is asked, his motion after trial to set aside the verdict and judgment based on the same facts should be denied. To entitle a party to protection in such cases he should be diligent at every stage of the proceedings.

TOTTEN v. POCAHONTAS COAL & COKE CO., ET ALS.

McDowell County. Reversed and Bill Dismissed.

Miller Judge.

SYLLABUS.

1. A deed whereby the grantor, for a small money consideration and "a good and peaceable life maintenance," bargains and conveys to his wife and infant children all his real and personal estate, but which contains no words of limitation, and which at common law would not have passed to the grantees a greater estate than one for the life of the grantor, will not now, by virtue of section 8, chapter 71, Code 1906, pass a fee simple estate if the contrary intention appears.

2. Where in such deed the grantor after the premises, and in express terms retains the legal title to the land granted, and in himself and wife, one of the said grantees, upon certain contingencies and conditions stipulated therein, the power to sell and convey said land a subsequent deed by him and his wife to a third party, made in execution of the right and power so reserved, reciting the occurrence of said contingencies and conditions, will pass good title to the land to such third person, and operate as a defeasance of all right and title which vested immediately in the grantees in said former deed, or that on the death of the grantor but for the execution of such power might have vested in them by virtue of the grant or by virtue of the subsequent provision thereof that, "the division of this deed, shall at the death of said T. K. Totten be made equal between his wife, and all of the children now surviving and those that may survive."

3. In the construction of such deeds the rules against repugnancy of terms and restraints upon alienations, applicable to deeds granting estates in fee simple have little, if any, application.

CRAWFORD'S ADM'R. v. TURNER'S ADM'R. ET AL.

Jefferson County. Affirmed.

Robinson President.

SYLLABUS.

1. Whenever a mere legal demand is properly cognizable by suit in equity, the statute of limitations will be observed in relation to it by the equity court: and if the bill discloses the bar of the statute, a demurrer hereto will be sustained.

2. As to a demand which accrues to a decedent's estate after his death, the statutory period of limitation of suit is counted from the time his personal representative qualifies, if that is within five years after his death; but if there is no qualification of a personal representative within five years after his death, then the period is counted from the end of that five years.

CAMDEN CLAY CO. v. TOWN OF NEW MARTINSVILLE.

Wetzel County. Affirmed.

1. When a demurrer to a plea is overruled, the plaintiff cannot reply in point of fact unless he withdraws the demurrer; but leave to withdraw the demurrer will be conceded as of course and answer in point of fact then allowed.

2. Though a demurrer to a plea is not formally withdrawn after it is overruled, the defendant will be held to a recognition of its implied withdrawal if he permits an issue of fact to be joined by replication to the plea without objection on his part.

3. A town may expend its current revenue and accrued funds and may make contracts to that end. To do so is not to contract debts within the meaning of the constitutional inhibition.

4. If the contracts and engagements of a municipal corporation do not overreach the dependable current resources for which provision exists at the time the contracts and engagements are assumed, no lawful objections to them can be interposed, however great the indebtedness of the municipality may be.

5. A party to assert successfully the invalidity of a contract made by a municipal corporation, on the ground that it has assumed an indebtedness beyond that which it could legally assume by the contract, must establish by clear evidence all facts necessary to show the alleged invalidity.

Opinion by Robinson, President.

MORRIS v. DUTCHESS INSURANCE COMPANY.

Harrison County. Affirmed.

Miller, Judge.

SYLLABUS.

1. Denial by a fire insurance company, within the sixty days given the insured to furnish preliminary proofs of loss, of its liability on other grounds, is in legal effect a waiver of the conditions of the policy requiring such proofs.

2. But such denial and notice thereof to the insured to bind the insurance company must be by some officer, or agent having authority, express or implied. Neither the declaration of a local soliciting agent nor of an adjuster not shown to have authority to make such denial will bind the insurance company, or excuse the insured from compliance with the conditions of the policy to furnish such preliminary proofs.

3. Furnishing of the preliminary proofs of loss as required by the conditions of the policy of fire insurance is a condition precedent to any right of action thereon, and unless waived an action on the policy does not accrue to the insured until such proofs have been furnished.

HEADLEY v. COLONIAL COAL CO., ET ALS.

Tyler County. Reversed and Remanded.

Williams, Judge.

SYLLABUS.

1. Where a wife joins her husband in a deed conveying a one-half interest in under covered oil and gas in place, she thereby releases her claim to dower in such portion.

2. If after the execution of such deed and the death of the husband, the wife should then unite with the heir in the execution of an oil and gas lease purporting the lease to the whole of the oil and gas underlying the land, she will be estopped to claim dower against the lessee, or his assigns, in more than one-half of the royalty oil reserved in the lease.

3. Upon the husband's death the wife's right to dower becomes a vested interest, and by joining the heir in an oil and gas lease, before assignment of dower, reserving a portion of the oil to be thereafter discovered, as rent or royalty, she does not thereby release her dower in the royalty oil. Her interest in the royalty is the same as it would be in the royalty derived from a like lease made by the husband in his lifetime.

CLARK v. DOWER, ET AL.

Mason County—Dismissed.

Williams, Judge

SYLLABUS

In an action of trespass on the case for injury to real estate, where plaintiff and defendant agree before trial that if plaintiff is entitled to any damage at all it shall be twenty-five dollars, and there is a verdict and judgment for the defendant, there is no jurisdiction by writ of error in this court.

If in such action, defendant does not plead the general issue, but sets up by special plea the right to a private way by prescription over plaintiff's land, such plea does not convert the plaintiff's action into a controversy concerning a way, within the meaning of Sec. 3 of Art. VIII of the Constitution of West Virginia, so as to entitle him to a writ of error to this court, when the damage claimed for the trespass is less than one hundred dollars.

Whether a license, or right of defendant acquired by prescription, to use plaintiff's land can be given in evidence under the general issue, in actions of trespass *quare clausum fructu*, discussed but not decided.

RYAN ET AL. v. NUCE ET ALS.**Monongalia County Reversed and Remanded.****Miller, Judge.****SYLLABUS.**

1. A contract when reduced to writing becomes the repository of the common intentions of the parties, all prior or contemporaneous negotiations becoming merged therein, and it cannot be contradicted by extrinsic evidence.

2. A bill to cancel a contract for fraud in its procurement should as a general rule allege plaintiff's willingness and ability to do so, and tender to defendants all property and rights derived under the contract.

3. As a general rule a bill to cancel a contract for fraud in its procurement should specifically allege the facts constituting the fraud; and where false representations are relied on such representations must not only be averred, but it must also be alleged that they were in fact false, were relied on by plaintiff and that plaintiff did not know the falsity thereof, and was injured thereby.

4. Where a good case for relief is shown by the evidence but the facts are not sufficiently pleaded in the bill, the court should not dismiss the bill without first giving plaintiff an opportunity to amend.

WRIGHT v. RIDGELY.**Cabell County. Reversed and Remanded with leave to amend.****Poffenbarger, Judge.****SYLLABUS.**

1. As malice is an essential element of an action for malicious prosecution, lack of an averment thereof in the declaration cannot be disregarded on demurrer, under the statute of jeofails, and is fatal.

2. Such a defect in a declaration is not cured by verdict, when a demurrer to the declaration has been interposed and overruled.

3. To be available in the appellate court, erroneous rulings of the trial court, respecting admission and exclusion of evidence, must be, not only saved upon the record, but specifically pointed out by special bills of exception or assignments of error in the petition or brief. The court will not search the stenographic report of the evidence for them.

LAWSON v. HERSMAN.**Lewis County. Dismissed; Improvidently Awarded****Robinson, President.****SYLLABUS.**

When it appears without conflict or doubt from the record, in a purely pecuniary action, that the sum for which plaintiff was entitled to judgment, if entitled at all, did not exceed one hundred dollars, a writ of error cannot lie to a denial of judgment to him, even though he declared for a sum sufficient to call for appellate jurisdiction.

TRI-STATE TRACTION CO. v. P. W. & K. R. R. CO. ET AL.

Brooke County. Affirmed.

Robinson, President.

1. In a suit pursuant to Code 1906, ch. 52, sec. 11, for decree fixing the crossing of one railroad by another, the holders of the mortgage bonds of the defendant railroad are not necessary parties when the trustees in the mortgage are made parties.

2. An allegation of the bill in such suit which merely states that certain original mortgage trustees are dead and that defendant trustees have been appointed in their stead contains sufficient particularity as to the fact.

3. If the proposed crossing is within a city, it is not incumbent upon the plaintiff company to show that the municipal government has specifically granted permission to make the same, when a franchise from the city for the construction of plaintiff's railroad at the place of the crossing is shown.

4. An electric railroad may be decreed the right to cross a steam railroad. The physical character of the railroad seeking the crossing, or that of the railroad proposed to be crossed, has nothing to do with the applicability of the statute.

5. Grade crossings are not prohibited but are authorized by the law of this state. Where the facts warrant a crossing at grade, its construction and operation may be decreed.

STATE v. COLLINS.

(Misdemeanor No. 2.)

Pocahontas County. Affirmed.

Williams, Judge.

SYLLABUS.

Upon an indictment against C. for unlawfully selling spirituous liquor, wine, porter, ale, beer, etc., without a state license, the following facts were proven, viz: C. kept a room in which he conducted a game with cards called "stud poker;" chips valued at 5c, 10c, and 25c each, were used to represent money; at the beginning of each game a player would purchase a number of these chips from C. and pay the money for them; during the progress of the game C. would supply the players with beer and would take a portion of the chips, which was called a "rake-off;" at the end of the game the remaining chips in the hands of the winner were "cashed in," or redeemed by C.

HELD. The jury could infer that the "rake-off" was in consideration of the beer furnished to the players, and that it constituted a sale of the beer.

BARKER, ET ALS. v. STEPHENSON, ET ALS.**Kanawha County. Reversed, and New Trial Awarded.****Miller, Judge.**

1. The occurrence of a regular or special term of a circuit court within the thirty days after adjournment of the last preceding term does not cut off the time given the court, by section 9, of chapter 131, Code 1906, to make up and sign bills of exception.

2. The thirty days after adjournment of the term given the court by said section 9, chapter 131, Code 1906, to make up and sign bills of exception means thirty days after adjournment of the term at which final judgment is pronounced.

3. A judgment or order overruling a motion to set aside a verdict for defendant, and refusing plaintiff a new trial, is not such final judgment. The judgment to be final, in such a case, must be a judgment *nisi capiat*.

4. A case in which the trial court erred in excluding plaintiff's evidence and directing a verdict for defendant.

LUDWICK v. JOHNSON ET ALS.**Barbour County Decree Affirmed.****Foffenbarger, Judge.****SYLLABUS.**

1. In the case of a conveyance of land to a wife, a parol trust therein in favor of her husband may be established by proof that the latter paid the purchase money in pursuance of an oral agreement between them, antedating, or contemporaneous with, the conveyance, that he should do so and that the wife should take the legal title in trust for him.

2. *Prima facie*, such a conveyance is a gift from the husband to the wife, but the presumption of donation, arising from mere payment of the purchase money by the husband, is rebuttable.

FISHER ET ALS. v. HARMAN ET ALS.**McDowell County. Affirmed.****Miller, Judge.****SYLLABUS.**

1. The statute, section 1, chapter 89, Code, (1906), provides for but one form of summons (declaration), and evidence of forcible entry by defendant, which is unlawful, is admissible thereunder, without specific allegation thereof.

2. Where in such action the defendant's entry was forcible it is unlawful regardless of the question of right.

3. A case in which the acts and conduct of defendant in making an entry on land, as proven on the trial, were held to constitute a forcible and unlawful entry entitling the plaintiff to recover.

KENNEDY v. MERCHANTS & MINERS BANK ET AL.

Fayette County. Affirmed.

1. In trial of right to property levied on, conflicting facts and circumstances in relation to fraud vitiating claimant's title as against creditors are properly determinable by the jury and the verdict upon such facts and circumstances will not be disturbed.

2. When all the stockholders of a corporation informally but plainly authorize a sale of all the corporate property, a transfer thereof on behalf of the corporation in pursuance of the authority so given is the corporate act and passes title.

Opinion by Robinson, President.

THE J. C. ORRICK & SON CO. v. DAWSON.

Morgan County. Modified and Affirmed.

Williams, Judge.

SYLLABUS.

1. Defendant cannot recoup damages if they depend on the breach of a contract different from, and independent of, the one on which suit is brought.

2. In an action by plaintiff for the price or goods sold and delivered, defendant can not recoup damages for plaintiff's refusal to accept other goods sold to plaintiff by defendant under a separate and independent contract.

3. Parol testimony is inadmissible to prove an unwritten agreement made at the time of, or prior to, a written agreement, for the purpose of varying or contradicting the terms of the latter.

PRESTON v. BENNETT.

Raleigh County. Affirmed.

Williams, Judge.

SYLLABUS.

1. If land be sold twice at the same tax sale for two several years' delinquency of taxes assessed in the names of two successive owners and an individual buys under the sale to satisfy the first delinquency and, after a year, obtains a deed and records it, he will have title against the state who buys under the sale made to satisfy the second delinquency.

2. A claimant of land that is proceeded against as the state's land under chapter 105 of the Code, who is known or whose claim to the land can be ascertained by the use of reasonable diligence, should be made a party to the bill *ex nemine*, and, if a resident of the state, should be served with process.

3. It is error to proceed against such claimant under the general description in the bill of "unknown claimants," and any decree that may be pronounced against him, without his appearance in the cause, will be void as to him for want of jurisdiction and may be collaterally assailed.

IRVIN ET ALS. v. STOVER ET ALS.
Raleigh County. Reversed and Remanded.
Williams, Judge.

SYLLABUS.

1. A deed to T. S. and M. J. S., his wife, contains the following clause, viz.: "to be held by them as a homestead for themselves, and after them their heirs, One Hundred Acres of Land." Held:

I. The husband and wife take an estate by entireties for life only, with the right of survivorship.

II. Under the statute abolishing the rule in *Shelley's Case* the heirs of the husband and the heirs of the wife, respectively, take a contingent remainder.

III. Upon the death of either husband or wife, title to one undivided moiety of the land vests immediately in his, or her, heirs, as the case may be, subject to the life estate in the whole of the surviving life tenant; and upon the death of the survivor, title to the other moiety vests in his, or her, heirs.

2. In construing deeds, as well as wills, the purpose is to ascertain the intention of the parties, and when the intention is thus ascertained it will be effectuated, unless it contravenes some principle of law.

3. Where an estate in lands is granted to a husband and wife for life with remainder to "their heirs," the presumption of law is that the heirs of each, as a separate class, take a moiety of the remainder.

4. The word "heirs," when used in an instrument of conveyance to designate the class of persons to whom an estate is conveyed, should be given its legal and technical meaning, unless there is some other language in the conveyance clearly showing that the word was intended to have a different meaning, or unless the circumstances of the case are inconsistent with such meaning.

5. When two or more persons are seized in common of the same tract of land and are entitled to the possession, they may have partition, regardless of their source of title.

6. A decree entered in a suit brought by a creditor attacking a deed as fraudulent as to his debt, which sets aside the deed only as to his debt and directs a sale of the land, has no effect upon the title conveyed by the deed, when it appears that there was no sale under the decree, and that the suit was afterwards dismissed on motion of the attacking creditor.

7. Where one, having only a life estate in land, makes a deed purporting to grant it in fee, and covenants to warrant generally the title, and afterwards acquires title adverse to the title granted, such after-acquired title will pass by way of estoppel to his grantee or those claiming under him.

8. Section 118, Chapter 71, Code (1906), does not abolish the right of survivorship between husband and wife in a joint estate held by them for life only. Survivorship as to such an estate remains as at common law.

FARLEY v. NORFOLK & WESTERN RY. C.

McDowell County. Reversed and Remanded.

Williams, Judge.

SYLLABUS.

1. A passenger who attempts to alight from a moving railroad train, when he knows it is dangerous to do so, and is injured thereby, is guilty of such negligence as will preclude recovery, notwithstanding he may have been directed or told by the conductor to get off.

2. One is not bound to assume the risk of a known danger because he is directed to do so by another; he must think and act for himself, and if he relies upon another's judgment and does an act, contrary to his own sense of prudence, he is negligent.

3. A railroad company is not liable for the act of its agent or conductor in negligently directing a passenger to jump from a moving train, when the circumstances show that the danger was obvious to the passenger himself, and when no force or threats were used to eject him.

4. Negligence of a railroad company in failing to stop its train long enough at a station to permit passengers to alight will not absolve a passenger from negligence in attempting to alight from the train after it has again been put in motion.

FULTON v. RAMSEY, ET ALS.

Braxton County. Affirmed.

Poffenbarger, Judge.

SYLLABUS.

1. Though an appearance in a cause, for any purpose other than to take advantage of defective execution, or non-execution, of process, constitutes a waiver of defects in the service of process, the purpose of such appearance must bear some substantial relation to the cause. In other words, it must be a purpose within the cause, not merely collateral thereto.

2. A mere inquiry as to whether continuance can be taken, without waiver, of service, or offer to move for a continuance, provided it can be done without such waiver, does not amount to a general appearance.

3. A general appearance must be express or arise by implication from the defendant's seeking, taking or agreeing to some step or proceeding in the cause, beneficial to himself or detrimental to the plaintiff, other than one contesting the jurisdiction only.

THACKER COAL & COKE CO. v. NORFOLK & WESTERN RY. CO.

Mingo County. Decree Affirmed.

Brannon, Judge.

SYLLABUS.

1. A court of equity of this state has no jurisdiction to enjoin a railroad company engaged in interstate transportation from filing with the Interstate Commerce Commission a schedule of its rates for transportation of coal from a point in this state, on the ground that such rates are unreasonable, unfair and discriminatory.

2. It is the exclusive power of the Interstate Commerce Commission, in the first instance, to pass on the fairness and reasonableness of rates contained in the schedule of rates fixed by an interstate carrier on articles transported in interstate commerce.

STATE v. MOORE.

Wetzel County. Judgment Affirmed.

Brannon, Judge.

SYLLABUS.

A license to sell intoxicating liquors granted by a county court, upon a petition filed by its clerk less than thirty days before the day for hearing it, as required by Code 1906, ch. 32, sec. 12, is granted without jurisdiction, is void, and may be collaterally attacked upon trial of an indictment for selling without license, and is no defense.

MITCHELL v U. S. COAL & COKE CO.

McDowell County. Reversed; Judgment for Plaintiff.

Williams, Judge.

SYLLABUS.

1. It is the duty of the master to furnish reasonably safe appliances in and about the working place of his servants. This duty is non-assignable.

2. An electric wire used on a motor car to carry the electric current from the overhead trolley wire to the machinery of the motor car, on which the insulation is allowed to become so broken, or defective, as to allow the naked wire to come in contact, either with the metal top of the circuit breaker, or with the body of a servant whose duties are such as to require him to work on, and about, such motor car, is not a reasonably safe appliance.

3. The master is liable if a servant who has no knowledge of such defective appliance is injured, or killed, thereby.

4. When the plaintiff's evidence is such that the court should not sustain defendant's motion to exclude it, it is error to set aside a verdict found for plaintiff.

STATE v. ATKINSON.

Logan County. Reversed, Verdict Set Aside, and New Trial Awarded.
Miller Judge.

SYLLABUS.

1. The manager of a social club chartered and organized under and pursuant to section 120a, chapter 32, Code Supplement, 1907, with license regularly obtained from the county clerk, and payment of taxes thereon as assessed by such clerk, as provided by said section is not liable to indictment for selling intoxicating liquors to a member of such club.

2. Such social club, having obtained such license and paid the taxes assessed thereon, is not required by section 1, chapter 32, Code Supplement, 1907, as a condition precedent to selling or dispensing intoxicating liquors to its members, to also obtain a state license from the county court, or from the council of a municipality, where such club is located.

3. A certificate of license "to keep said club," regularly issued by a clerk of the county court to such social club, as provided by said section 120a, with assessment and payment of taxes thereon as provided thereby, constitutes a valid license to sell and dispense intoxicating liquors to members of such club, though such certificate does not on its face specifically give right to sell.

4. It is error for the court on the trial of an indictment, charging the manager of such a social club, with selling intoxicating liquors without a state license therefor, to exclude from the jury its charter, license, minutes of stockholders and board of directors, and other documents relating to the organization and management of such club, and the application for and membership therein of the person to whom it is alleged illegal sales were made.

5. The remedy by complaint to the circuit court, or a judge thereof in vacation, and notice thereof to such club, as provided by said section 130a, for obtaining an adjudication that such club is being or has been conducted for the purpose of violating or evading the laws of the state regulating the licensing and sale of intoxicating liquors is exclusive, and the question of the bona fides of such organization can not prior to such adjudication, and on the trial of an indictment of the manager of such club for alleged illegal sales to members thereof without a state license therefor, be determined by the court or submitted to the jury.

Absent: Williams, Judge.

McGLAMERY v. JACKSON.

Greenbrier County. Judgment Reversed, Verdict Set Aside, Demurrer Sustained and Case Remanded.

Poffenbarger, Judge.

SYLLABUS.

1. Lack of an *ad damnum* clause in a declaration in trespass on

the case is an omission of matter of substance and cannot be disregarded on a demurrer to the declaration.

2. When a demurrer has been interposed for such a defect, it is neither waived nor cured by the verdict.

3. Trespass on the case in the nature of an action for waste may be maintained by a reversioner, vested with the remainder in fee simple, against the life tenant, for injury done to the estate in remainder by the cutting of timber on the land.

4. A deed by which the grantor, reserving to himself a life estate in the land, grants and conveys, to his grand-daughters, for and in consideration of natural love and affection and five dollars in money, "the remainder in fee simple after the life estate therein" of himself, vests a present estate in remainder in the grantees.

McGRAW v. LAKIN.

Preston County. Decision Affirmed.

Brannon, Judge.

SYLLABUS.

1. In an assessment and sale list for taxes in the surnames of two joint owners, as "Cofran & McGraw," the mere omission of their christian names does not render the deed under a tax sale void

2. In case of separate ownership of minerals an assessment and sale for taxes of "Mineral Rights" in a tract of land is a sufficient description of the ownership of the property in such minerals and such description does render a tax deed void because of uncertainty in description.

3. Payment of taxes on a tract of land by the surface owner is not payment of taxes on minerals in it owned by another person and separately assessed with taxes in the name of the owner of the minerals.

FICKEISON v. WHEELING ELECTRICAL COMPANY.

Ohio County. Judgment Reversed.

Brannon, Judge.

The Wheeling Electrical Company sold electricity to the Bridgeport Electrical Company, to be used by the latter company in lighting the streets of Bridgeport, delivering the electricity from the wire of the Wheeling company to the wire of the Bridgeport company at a point where the wires of the two companies met. A wire of the Bridgeport company conveying the electricity along a street was grounded, and killed a person with its current. The Wheeling company is not liable to an action for the death of such person.

ASHLAND COAL & COKE CO. v. HULL COAL & COKE CORPORATION.

McDowell County. Judgment Reversed, Verdict Set Aside and Case Remanded for New Trial.

Poffenbarger, Judge.

SYLLABUS.

1. Although a condition precedent in a contract must be fully performed, in order to bind the opposite party to performance of his reciprocal obligation, acceptance of performance of only a substantial part thereof precludes reliance upon the breach as matter justifying renunciation or discharge of the contract.

2. Partial interruption, for a time, of a continuous duty, imposed by a contract, amounting to a breach of a condition precedent, is unavailing as ground of repudiation, if such partial performance has been accepted until the period of interruption has ceased.

3. Under such circumstances, waiver of the breach to the extent aforesaid, follows as matter of law, and is not a mere question of intent for jury determination.

4. A clause in a contract between a coke producing company and its sales agent, providing that, for certain specified causes, deliveries thereunder may be suspended or partially suspended, or, at the option of the party not in default, may be immediately canceled, during the period of such interruption, by immediate notice to that effect, contemplates partial performance, under such circumstances, in the absence of cancellation, and imposes upon the party not in default the duty of election between cancellation and acceptance of partial performance, on the happening of the contingency or as soon thereafter as may be practicable.

5. Such clause does not authorize cancellation for all time, but only during the period of interruption.

6. Failure of full performance, due causes other than those specified in such clause, amounts to a breach, but, if the opposite party induced or caused such breach by its own fault, it can take no advantage of it.

7. A claim for unliquidated damages is not available as a set-off.

8. Such a claim may be proved in reduction or bar of the plaintiff's demand, if it grows out of the contract on which the plaintiff sues, but no recovery over in favor of the defendant can be had thereon.

STATE v. STEPHENSON.

Mercer County. Affirmed.

Poffenbarger, Judge.

SYLLABUS.

1. For identification of a bill of exceptions as one made a part of a record by an order, it is not necessary that it bear any number, letter or peculiar mark, or that the order refer to it as being a number, letter or mark, if the substance of the bill and the descriptive

matter, found therein, are such as leave no room for reasonable doubt that the paper is the one referred to in the order.

2. In the absence of any controlling fact or circumstance, rendering it manifestly unjust to do so the trial court may refuse leave to withdraw a plea of guilty of murder of the first degree, and enter, in lieu thereof, a plea of not guilty.

3. To make the action of the court, in doing so, an abuse of its discretionary power, it must appear that the plea was entered under some mistake, misapprehension, compulsion or inducement, or circumstance, working injustice.

4. That the plea was entered under a mere surmise or conjecture of the prisoner or his attorney or both that, owing to the known temperament of a special judge, sitting at the time of the entry thereof, the punishment would be lighter than that anticipated from the regular judge, who returned to the bench to render judgment on the plea and fix the penalty, is not sufficient to deprive the court of its discretionary power to refuse such leave.

5. Such regular judge is not disqualified to render judgment on such plea and determine the penalty, by reason of his having derived impressions, unfavorable to the accused, from conversations had with such special judge and the witnesses, and previously pronounced a sentence of death upon him, erroneous and reversed because of his failure to hear the witnesses regularly in the presence of the prisoner, for the enlightenment of his conscience and judgment in fixing the punishment.

6. In determining whether to sentence a prisoner to life imprisonment or death, upon his plea of first degree murder, the court is not not limited or bound to an exact finding as upon an issue of fact. It exercises a discretionary power, conferred upon it by a statute, wherefore the judge need not possess the qualifications of jurors, trying the issue upon a plea of guilty.

PRICE ET AL v. LAING, ADM'R.

Greenbrier County. Affirmed.

Hoffenbarger, Judge.

SYLLABUS.

1. A general creditor of a deceased person cannot maintain a bill in equity against the personal representative, to charge, in his hands, the personal estate only, without showing some ground of equity jurisdiction, such as inadequacy of the legal remedies, inability to obtain satisfaction of his debt by pursuit thereof to judgment and execution, or necessity for discovery.

2. Mere failure of a personal representative to return an inventory of the personal estate within the time in which the law requires him to do so, will not sustain a bill for discovery and relief in such case. Such a bill must comply with the rule, requiring a showing of necessity for the discovery, due to indispensability of the evidence sought and inability to obtain it otherwise than by discovery.

M. H. WILLIS.

JAS. H. HALLER

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THE



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The Bar

VOL. XVII

AUGUST-SEPTEMBER, 1910

Nos. 8 and 9

THE BAR

Official Journal of the
WEST VIRGINIA BAR ASSOCIATION

Under the Editorial Charge of the
Executive Council.

Published Monthly from October
to May. Bi-Monthly from June
to September.

Entered as second class matter
August 11, 1904, Postoffice, Morgantown, W. Va., under the Act
of Congress, March 3rd, 1879.

Price, per copy.....\$.10
Yearly, in advance..... 1.00

Advertising Rates on Request.

All Circuit Clerks are authorized agents to receive and receipt for subscriptions. Address all communications to THE BAR, Morgantown, W. Va.

AN OPEN FORUM

This Journal is intended to furnish an open forum to every lawyer for the discussion of any policy or proposition of interest to the Profession. It invites a free interchange of views upon all such topics whether they agree with the views of THE BAR or not.

THE BAR goes to every court house in the state, and is read by, probably, three-fourths of the lawyers of the state, and thus furnishes not only a ready medium of communication between members of the Profession, but of unification of the Profession on all matters of common concern, which is its prime mission.

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THE TWENTY-SIXTH ANNUAL MEETING OF THE STATE BAR ASSOCIATION

The recent annual meeting of the State Bar Association, at White Sulphur Springs, was a very delightful occasion.

It was another demonstration of that—"it is a good thing for the brethren *to meet and come together.*"

It served to rekindle the social ties and feelings of brotherhood in the Profession which the association has done so much to develop and foster.

The sumptuous entertainment of the White Sulphur Springs Hotel; the elegant appointments for the meetings of the Association; the splendid environments of this celebrated resort, made one of the most comfortable and enjoyable meetings in the history of the Association.

The best proof that the members were pleased is that they voted to return for the annual meeting next year.

There was no single protest against this proposition, because that might have implied a lack of appreciation for the place and the accommodations which everybody enjoyed. But there was a silent consciousness, which may be given expression here, that the general prosperity of the Association was not the first consideration in holding two succeeding meetings at the same place. The Association has found it necessary to itinerate in order to enlist the active interest of the bar of the State. When the lawyers of any section have manifested indifference to the Association we have only had to appoint a meeting in that county or locality and everybody joins. The county of Marion was a notable example of this. For many years that large and able bar stood aloof. We believe there was only one, or perhaps two, of its number enrolled as members. The Association stormed the county capital and every last "chick" of that bar was captured. They capitulated without firing a gun, and it now has one of the largest enrollments in the State.

White Sulphur is not the county seat of Greenbrier. We captured a few of its lawyers at the recent meeting, but as an aggregate result of that meeting we lost more members by death

and otherwise last year, than we added by way of new members. Next year the net result will probably be worse for the Association.

While the White Sulphur is a most delightful place for a meeting it must not be overlooked that it is geographically inconvenient to most of the bar of the State and almost inaccessible to some. It means about four days of travel, going and returning, in slow, stuffy accommodation trains, with changes at almost every important station, for the lawyers of the northwestern communities.

They will not attend the meeting and they ought not to be criticised. These things are only referred to here, not to discourage the attendance, but that the general interest of the Association may not be forgotten or ignored. To those who can afford to go, we believe the next meeting of the Association, from a social standpoint, promises to be a record breaker. Plans are on foot to have the brethren from the Old State, meet with us, and everybody will be out for a good time.

The fact is that two annual meetings a year are not too many for the State Bar Association, a business meeting in the winter and a social meeting in the summer, with an appropriate program for each. Why not?

So far as the addresses and papers delivered at the recent meeting are concerned, we believe it to be a conservative estimate to say that as a whole they equalled or excelled in practical value and interest those of any previous meeting.

They were all first class and one or two of them in a class by themselves.

Beginning with President Haymond's interesting address on "Our Law of Eminent Domain," which made the occasion for a lively and general discussion; there followed in the course of the program, a most elaborate and well digested paper on the subject of "Should West Virginia Have a Workman's Compensation Law?" by Luther C. Anderson, of the Welch bar. Mr. Anderson has evidently given much time and study to this subject. His paper was printed and distributed among the Association and will be heard from hereafter.

Mr. Thos. H. Cornett of New Martinsville, read a striking paper on "Our Law of Administration," which it is to be hoped may stimulate some reforms in this direction.

Judge G. W. Atkinson gave us some new ideas of the magnitude of the business of the U. S. Court of Claims. As Secretary Nagel was prevented from being present, his place on the program was occupied by Judge Atkinson which conveniently filled the evening session of the first day.

It is impractical for us to more than mention these able papers in this place.

Of equal interest and importance with the papers were some of the reports of the Standing Committees. It is an encouraging feature of our meetings that these annual reports are every year receiving more studied attention from the committees, and that they present well formulated recommendations on the subjects committed to them. It is only through this work of the committees in the interims of the meetings that the Association can hope to accomplish anything worth while.

Two of the chairmen of these standing committees, Messrs. Jacobs and Brannon, were unavoidably absent, but manifested their official obligation and loyalty by sending reports.

Mr. B. M. Ambler, who is chairman of the committee on Judicial Administration and Legal Reform, which committee is the convenient dumping ground for most of the important measures of the Association, presented an elaborate report comprised in 18 pages of printed matter, and covering several measures referred to it, to-wit: Defective acknowledgements of deeds of married women; Process against partnerships; Judgment against two or more defendants in an action on contract where the plaintiff is barred as to one or more; and the abolishment of private seals.

The mere mention of these topics of the report is enough to indicate its importance to the Profession; and the Association is fortunate in having a member of Mr. Ambler's industry, experience and clear-headedness, who will give his time and

though in the midst of a busy life, to work out the problems with which it is wrestling from year to year.

There are some of the measures that we are tempted to discuss briefly here, but on second thought postpone comment 'till we can take them up separately and independently.

One thing we hope this committee will include in its next annual report: It is directed to report a measure for expediting proceedings in chancery. In that connection we hope it will not fail to report a measure or scheme for taking depositions that will unite the Profession on a single path of reform.

In relation to the report of the Committee on Education, there seemed to be some existing misapprehension as to the present status of the law fixing the requirements for admission to the bar. The Court of Appeals has already added a new rule as to the educational qualification of applicants which raises the standard to a reasonable and satisfactory degree; and that new rule has already been incorporated in the regulations of the examining board in determining the qualification of candidates who seek to enter the examinations.

In our view there is now but one feature of our law regulating admission to practice that calls specially and urgently for amendment and improvement—there is but one loophole for the shyster and the unfit to get through the fence or scale the barriers that protect and preserve the dignity and integrity of the Profession. This defect relates to the admission to practice of attorneys from other states. By the second section of chapter 119 of the Code "Any person duly authorized and practicing as counsellor or attorney at law in any state or territory of the United States or in the District of Columbia, may practice as such in the Courts in this State, upon producing before the courts in which he intends to practice, satisfactory evidence of his being so authorized."

It is held by many of the courts and lawyers of the State that this section was intended for the benefit of lawyers who happen to come from another State to represent a client in a single case, and with no intention of locating permanently in

this State. But the interpretation of this section is not uniform. Perhaps a majority of our courts accept it as authority for the admission of any interloper who comes with any semblance of authority to practice law. The result is that this State has been and is, being made the dumping ground for the offal of every other State,—the shysters, roustabouts, renegades and incompetents of the bars of any State or territory—and who are thereby enabled to evade the requirements and standard of qualifications demanded of our own people and to compete side by side with them, and share with them all the privileges and rights of members of the bar, although neither complying with or possessing the qualifications required of our own citizens.

This is a manifest wrong and an unconscionable discrimination against our own lawyers and in favor of the foreigner who most often has no qualification and no antecedents which justify his admission to the bar.

We submit that this door ought to be closed: and that it be effectually closed by a simple amendment of the section in question, by adding the qualification:

But this section shall not operate to admit to practice in any of the courts of this State any person whose purpose is to acquire a residence and continue to practice therein, unless and until he has complied with the requirements of the first section of this chapter.

We are moved to remind the Committee on *Legislation* that it has long been delegated and invested with authority and urgent request of the Association, to have this rat-hole plugged up, either by the Court of Appeals or Legislature; and as the Court has declined, we hope to hear a report from the committee at the next annual meeting that the Legislature has furnished the plug.

There are many other items of interest growing out of the recent meeting that deserve mention; but we assume that the year-book containing a full report of the proceedings will shortly be in the hands of all members, from which they will derive more satisfaction.

The Association chose W. W. Hughes, of the Welch bar,

for its President this year. Mr. Hughes is a young man of high personal character, ability and standing in his profession, and will fill the office with credit to himself and the Association.

Most of the other offices were filled by reinstating the incumbents, on the policy that when the Association finds a working horse, it will work him.

We may only add that the record of the 26th annual meeting is satisfactory.

A PRACTICAL AND SAFE BASIS FOR REFORM IN THE COURTS.

We believe that the most effective and comprehensive answer to the public demand for reforming our Courts, can be accomplished—not by legislative enactment, and spasmodic amendments to the laws—but by “Rules of Practice,” regulating the procedure in our courts.

We believe also that these rules ought to come—not from the Legislature—but from the bar itself, duly commissioned and authorized to formulate and adopt them. Nearly every defect complained of in the methods of our courts, can be corrected, and only corrected by a well digested and well enforced Code of rules, regulating the practice in our courts.

We have in mind a plan for bringing about this regulation of the practice which we herewith submit for discussion and criticism by the bar:

1. We would have all the Judges of the Circuit Courts, together with one member of the Supreme Bench, Constituted a commission by legislative act to make, adopt, formulate and put in practice a set or Code of rules of procedure governing and making uniform the practice in all the courts

2. The Commission should meet once a year at such time and place as it would appoint, to revise, amend, or repeal and perfect these rules, as experience might suggest. They should be printed and bound in convenient form at the expense of the State, and they should be binding on all the courts in so far as not in conflict with any statute.

3. If the Commission should desire to make any rule or regulation, that is in conflict with existing statute, they should recommend to the Legislature an amendment or repeal of the statute, and the Legislature could reserve the right to modify or abolish any rule adopted by the Commission.

We believe that this plan could be practically put in operation without any specific legislative act, if the Judges of the Courts could be brought to agree to carry it out; for they already possess general authority to regulate and control the practice in their courts. But they could go further and correct the practice in many respects where it is now regulated by statute, and there is no doubt but the main defects, the delays, the excessive costs, and the circumlocution in our courts would be corrected if such a commission was invested with legislative authority such as we have suggested.

We make the above suggestion for the purpose of inviting the views and criticism of the bar. If there is any virtue in it, why may not the Bar Association prevail with the powers-that-be to put it in operation?

And why may not West Virginia be the pioneer State toward a substantial and practical basis of reform in the courts?

There has been nothing seen in politics more hopeful of a higher party standard than the conduct of some of the recent nominating conventions in this State. When the office seeks the man, and the man puts aside his protests and his personal interest, and patriotically responds to the call of his country—this is seemly and satisfying and suggestive of a new era in politics. We refer to the conventions which nominated John W. Davis, W. S. Peterkin and Scott Withers, all honored members of the legal profession.

The last number of THE BAR was improperly designated as the July-August number, by mistake of the printer. It was the regular June-July number.

THE BUGBEAR OF DEPOSITIONS.

By common consent it is accepted that there is no drudgery in the practice of law equal to that of taking depositions in chancery.

By common consent also, it is accepted that there is no part of the practice that is so loose, unsatisfactory and unregulated as the taking of depositions under our system.

It is a free-and-go easy proceeding without authoritative control, depending for its regularity upon the whim of the attorneys engaged; and if either wants to play shyster and lug in irrelevant or scandalous matter, there is no authority to stop it—it goes into the record all the same, and is read by the Judge even if it is only for the purpose of passing on exceptions.

The whole thing is odious and inexcusably primitive and exasperating as a method of getting at the truth.

Why should it remain so?

Who is interested in having it continue?

Surely the Legislature would not balk at a proposition presented by the bar of the State for reforming this procedure.

And who is more interested than the lawyers?

We regard it as a reflection on the Bar Association of this State, that such flagrant defects in the practice of law should remain without an effort to correct them and without even a protest from the bar of the State, until they grow heavy with age.

These are defects in the practice for which lawyers alone are responsible. Laymen do not know anything about them, and if they did they would not be safe in providing a remedy.

This blunderbus method of taking depositions is not the only part of our practice that calls for reform, but some interest seems to exist in this just now, and we propose to keep it before our readers until something practical is accomplished. The committee on Judicial Administration and Legal Reform of the Bar Association will doubtless present a measure at the next annual meeting for reforming this procedure; but we believe the Association would be glad to see that Committee present a measure

to the next Legislature for adoption, rather than have the matter delayed for two years more.

In the meantime all the members of the Association have an opportunity for reaching the Committee with their views or proposals through THE BAR. Write suggestions or formulate plans for aiding the Committee to get the views of the bar and new ideas as to the best measure, before the meeting of the Legislature; and we believe the Committee will thus be induced to act at once and be able to report a consummated result at the next annual meeting instead of a tentative proposition.

Two correspondents discuss the subject in this issue of THE BAR. "J. R. D." proposes the amendment of the law providing for special judges, so as to make the tenure of special judge permanent and have him always on tap for taking depositions and other work.

Brother Bent, of Elkins, is the best satisfied man we have heard or read about. He would not dispute the existing method of taking depositions. There must be more time, more Christian charity, and more natural contentment in Elkins than any bar of the State—Like the old woman who said she had but two teeth left, but she thanked God they were opposite each other. We covet Bro. Bent's contented spirit, but we draw the line at the existing method of taking depositions.

We now have had the following different propositions made through THE BAR: Our original proposition was to have three Masters in Chancery in each Circuit Court, who should be invested with the Jurisdiction of the Circuit Judge in all matters pertaining to the taking of depositions.

The second proposition, made by Mr. Russell, of Wheeling, is to have all evidence in Chancery cases taken orally before the Circuit Judge, as in cases at law.

The third proposition is made by "J. R. D." already referred to, in this number of THE BAR, to have them taken by a Special Judge.

The fourth is a plea to "bear the ills we have rather than fly to those we know not of."

Now, let us have additional suggestions from the bar of the State. In a multitude of counsel there is wisdom.

CONFRONTING A CONDITION, NOT A THEORY.

Our correspondent, Mr. H. W. Bayer, of the Marion county bar, follows, with a trenchant criticism, the suggestion made by THE BAR sometime ago, in relation to expediting the trial of certain red-handed criminals in the interior of the State.

The crime, it will be recalled, was one of the most heinous and revolting in the annals of crime, the criminals were caught red-handed, and an outraged public sentiment was tense with suppressed indignation and still harder was it to suppress the mob spirit which was eager for revenge.

In commenting upon the situation we took occasion to say, in effect, that often under like conditions, to the excited populace, looking on, the only passive thing seems to be the courts, which must wait calmly and supinely until the established periodicity permits them to open their doors and answer the impatient demand for justice; and we suggested that there were times when it would seem expedient in the interest of justice itself and the deterrent force of the laws, that the trial of a heinous criminal should be accelerated rather than made to await an unalterable periodicity of the courts.

Now, having made this suggestion, we may surprise our correspondent by saying that we fully agree with all he has so well said in opposition and condemnation of lending the courts to "railroading justice" or to a participation in any degree in the vengeful spirit of the mob.

In other words we regard, as one of the most essential attributes of our courts, that they should be high above and beyond the reach of inflammatory public sentiment; that their proceedings should always be characterized by the calmest spirit and the most careful deliberation; and that no man, however, debauched, or besmirched by crime, should be put in jeopardy of his life or liberty where there is bias, prejudice, or passion anywhere in the machinery of a court.

The difference between our correspondent and THE BAR is that he was dealing with a theory and we were dealing with a condition. The abstract theory is absolutely sound and right,

but a concrete condition may be such as to justify a variance in its application—and without doing violence to the theory.

We all recognize and concede that the two chief virtues in the administration of our courts are certainty and celerity. A recent writer has expressed it thus: "Justice should be prompt. The trial may not be so long delayed that the original horror of the crime may be swallowed up in a maudlin sympathy for the accused and his relations. That is the history of most homicide cases. At first the mind is aghast at the enormity of the crime and eagerly desires the punishment of the guilty, but as time goes on memory blurs, the pendulum of public feeling swings too far the other way, and by the time the trial comes on there is nothing in the public vision except the spectacle of a man being tried for his life. So while the courts should be alert to safeguard the rights of all brought before them, we regard long delay in the trial of grave offenses as just as subversive of the ends of justice as a too speedy trial while popular indignation has not yet had cooling time."

The *condition* we are dealing with happens every day in some community. A vicious, bestial murder is committed, and the life of a respected citizen, man or woman, is sacrificed in a most unprovoked and inexcusable manner. A whole community is white with indignation and impatient to see the crime avenged.

Why should they not be indignant? It is righteous indignation. It is evidence of a high civilization—evidence of a christian abhorrence of lawlessness and crime. The absence of such a sentiment would be a reflection on the community.

Let us, then, not condemn the sentiment. Let us not even deprecate it. It is natural and ought to be commended.

It is natural too, and to be commended, that this sentiment calls for a swift vindication of the laws; that in the face of such a horror the powerful arm of a just and efficient government should be seen to move and fasten its irresistible grasp upon the offending citizen, and furnish an object lesson at this opportune moment of calm and inerrant judgment upon the offender.

For the courts to remain inert and passive at such a time may be the safest and soundest course to secure justice; but let us deal fairly with the condition and concede that this passive spectacle is the breeding ground of the mob, and tends to generate a contempt for the methods of the courts and deprives the law of its chief deterring influence.

All this must be conceded as part and parcel of the *condition*—and it is the condition we are discussing.

The question arises—and the only question we have raised in this connection is: Whether the courts have met and are meeting this condition as fully as its importance warrants, and if not, is it not possible for them to do so, or is it, indeed, incompatible with the constitution and character of a court to attempt it?

These are the only questions we have raised.

We have not attempted to answer them conclusively; we have only made a suggestion.

We have suggested, and still press the suggestion, that this impatience of the populace, at such times, is natural, respectable, and not to be ignored, and if it is possible for the courts in the orderly administration of justice, and without compromising with the mob, or surrendering their judicial spirit, to accelerate their action to the extent of conceding a prompt trial, there would be much gain. It is impracticable and indefensible to say that our courts must never act while public sentiment is pronounced and even inflamed against one accused of crime. Our courts do not take such an attitude. To do so would excuse some of the worst criminals from any trial. Our courts claim to be above such influences. If they are not they ought to be. And it is seldom that a notorious crime is put on trial but that public sentiment is strongly arrayed on one side or the other. But the procedure of the courts make provision against such influences in the selection of jurymen and the careful exclusion of any one from the jury box who is under suspicion of bias or prejudice. Failing in this there may be a change of venue beyond the zone of public agitation.

THE HIGHEST JUDICIAL TRIBUNAL IN THE WORLD

[Some interesting notes made by T. L. Jeffords of
Harpers Ferry.]

The United State Supreme Court is the highest judicial tribunal in the world.

The Constitution of the United States provides that the judicial power shall be vested in one Supreme Court and in such inferior courts as Congress may from time to time ordain and establish.

Congress has the power to establish these inferior courts and the power to abolish them.

It has lately established what is known as the Commerce Court, and the Customs Court, and during the Civil War it abolished the United States courts in the District of Columbia.

The Supreme Court of the United States is a creature not of law but of the Constitution and cannot be abolished by law.

It consists of "a Chief Justice of the United States," and eight Associate Justices.

Is the Chief Justice of the United States a Chief Justice of the United States Supreme Court because he presides there in the trial of cases any more than he is Chief Justice of the United States Senate because he presides there in the trial of impeachments.

At this time the office of the Chief Justice of the United States is vacant, and soon Mr. Justice Moody will retire and there will be a vacancy in the office of Associate Justice. There have been but eight Chief Justices of the United States and it is interesting to review their history.

President Washington appointed three, one of them resigned and one was not confirmed, although at the time of his appointment he was an Associate Justice of the Supreme Court of the United States.

President Washington of Virginia appointed John Jay of New York, First Chief Justice and after serving six years he resigned. President Washington then appointed John Rutledge of South Carolina and he was not confirmed. John Rutledge

served only one year and President Washington then appointed Oliver Ellsworth of Connecticut who served four years.

President Washington soon after taking the oath of office offered John Jay any appointment within the gift of the President and the position of Chief Justice was selected by John Jay.

Soon after John Adams was elected President. Chief Justice Ellsworth died and the President then offered the place to John Jay but he declined it and John Adams of Massachusetts appointed John Marshall of Virginia Chief Justice. It may be interesting to note that the four first Chief Justices had no middle name and three of them bore John as the first name, the four succeeding Chief Justices all had a middle name.

John Marshall served thirty-four years and was followed by Roger B. Taney of Maryland appointed by President Jackson of Tennessee. This Chief Justice served twenty-eight years.

President Lincoln of Illinois then appointed Salmon P. Chase of Ohio and he served nine years. President Grant of Ohio then appointed as his successor Morrison R. Waite of Ohio who served fourteen years.

President Cleveland of New York in 1888 appointed Melville W. Fuller of Illinois and he served twenty-two years being third in length of service.

Ohio is the only state who has had two chief Justices. New England has had but one. Rutledge of South Carolina, Marshall of Virginia and Taney of Maryland all south of the Mason and Dixon line served sixty-three years while all the others together and north of the line have served less than that time.

Six of the Chief Justices wore no beard, and only two, Fuller and Waite wore any beards, Fuller wearing a mustache, and Waite all the beard except a mustache.

President Lincoln appointed Chase who was a candidate for president against him to be Chief Justice, and it is now rumored that President Taft is likely to appoint Mr. Justice Hughes to be Chief Justice.

The recent death of Hon. John G. Carlisle, Speaker of the House, a United State Senator, and Secretary of the Treasury, serves to renew interest in the fact that President Cleveland of-

ferred to appoint him Chief Justice of the United States and he declined the office at a conference in which he and President Cleveland both expressed the desire and the hope if not the expectation that Mr. Carlisle might succeed Mr. Cleveland as President of the United States.

This instance so far as I can learn is the only well authenticated instance except that of Mr. John Jay in which a man refused this appointment. Several gentlemen have refused to be appointed Associate Justice of the Supreme Court, and noticeable among them is President Taft who was offered such an appointment by President Roosevelt shortly before the beginning of the Presidential campaign two years ago. It is said that Senator Edmunds of Vermont and Senator Spooner of Wisconsin and others have declined appointment as Associate Justice.

No doubt the general consensus of opinion is that Chief Justice Marshall was the greatest of them all and it is a striking fact that the great expounder of the Constitution the greatest interpreter of the Constitution and one of the greatest Federalists of the Country was also one of the greatest Virginians.

The most noted case with which the name of Chief Justice Taney is connected is the Dred Scott case.

Mr. Chief Justice Fuller may not at the present time be classed as a jurist with Marshall but as a gentleman no one could outclass him.

I had the honor and pleasure of an acquaintance with this Chief Justice off the bench and cannot speak too highly of him.

The last occasion on which I saw him except on the bench was the day before last Thanksgiving when I was at his home during a recess of court.

I had gone there to ask for a writ of error and no one ever had a more delightful call than I had that day. The Chief Justice was happy, witty, clear and entertaining. We had previously had some telephone conversations to which he referred pleasantly. Notwithstanding he was nearly eighty years old he read without glasses the papers I handed him. He greatly enjoyed his home and family but the next morning before the

Thanksgiving festivities began he found time to further examine the papers I left with him and granted the writ of error which I had asked.

Harpers Ferry, August 5, 1910.

TAKING DEPOSITIONS IN CHANCERY.

TO THE BAR:

In recent editions of the Bar, there has been some discussion of the method of taking depositions in chancery causes. Change and departure from the present method is suggested either by a special master or before the judge in open court. These discussions are in the April, and July and August Bar. Nothing is offered in favor of the special master scheme, and in connection therewith nothing in particular is urged against the present system. Later, in a paper by H. M. R. it is claimed that if depositions were taken in open court, with the judge and witness face to face, and the memory of the judge refreshed by the stenographic notes, a more speedy and just conclusion on the merits of the cause would be subserved. There ought to be reform, but the evil, if any to be reformed is not of itself, inherent in the present system, but in the abuse of it, according to my view.

I insist that there is much reason to say, that the present method of taking depositions in chancery causes, offering as it does, a quiet period for deliberation in the vacation of the court, on depositions as they are taken, and after they are taken, offers the best possible opportunity for counsel and litigant to present to a judge, both by proof and argument, at the bar in term, the real merits of every cause.

On the point of ruling by the judge on evidence offered and objected to in open court, as suggested, what remedy does that afford against delay or error of judgment? One of the excuses already offered by a circuit judge of this state, the Hon. J. C. McWhorter, in the February Bar, for erroneous judgments of our circuit judges, is their compulsion to hasty conclusions, because of over work and want of time for mature deliberation.

According to the judges figures, the most the circuit judges have ever been able to save out of appeals taken from them is 50.3% of affirmances; On the whole it would be very safe to say that in all appellate proceedings reversals result in more than half the cases looking at other figures of judge McWhorter. These reversals run as high as 74% in at least one circuit for the last ten or twelve years. What the cause for it, I will not say, that I do know that it is a practical denial of justice to litigants. and if overwork is the cause let us not add depositions in chancery to their labors. The probability now of obtaining justice in any case is about even chances with throwing heads and tails, or with the little old game of "crack 100." It is urged by H. M. R. in July-August Bar, that if the witness must confront the judge, that the judge will, or may, quite largely from the manner and bearing of the witness, be more able to allot to the spoken words of the witness, their true value in the cause. While this suggestion is not wholly without merit, it may be questioned whether it is entitled to as much consideration as it seems to get. This perspective of the judge—or jury, is often urged by appellate courts as a very last and sufficient reason for refusing a new trial in actions at law; observing, in substance, in such cases, "that the judge or jury below might have seen some caper or antics of a witness which does not appear in the record," thus raising a mere disputable presumption. We are told however that taking depositions in open court in the presence of the judge, will double the expense of maintaining the courts, and therefore quite double the number of judges. In the interest of economy in men and money, I would most respectfully suggest that the law be so amended that in addition to requiring a notary to certify the expiration of his commission, he be required to carry a pocket kodak, and certify under his hand and kodak, the antics and gymnastics of witnesses. This would cure Hans Oftus of coming to the witness stand with his hair scrambled, and Herman Schluss from coming with his countenance all ironed out. It would to a degree, at least, save disputable presumption referred to as a consequence of "absent treatment."

If the movements, countenance, demeanor or deportment of witnesses are to be taken as evidence in the cause moving the court to lean one way or another, for or against the verbal statements of the witnesses as they at times really are, as when a witness looks down his nose or up through his eyebrows, why not have the court stenographer make a few notes of that kind of evidence? For instance, once the judge said to the witness who persisted in talking to counsel instead of the jury, "Witness, witness, address the jury sir." The witness who was about as tall as a Norway Pine gathered up his feet and arose to his full height and turning face to the jury, said "Gentlemen of the jury, how do you do?" Another witness chews gum; rapidly ruminates all the while he or she is on the stand: another comes along and takes his seat smiling, as much as to say, "Ietergo"—when you'r ready. If all such or similar antics may properly lead a judge to shade the testimony of such witnesses, and are therefore evidence in the cause, then impenetrable secrets, instincts, motives and emotions of a witness, is the court or jury supposed to look into the face of a witness and there gather evidence, as bees gather honey, in aid of a verdict; or judgment of the court? That might be a more or less dangerous field in which to allow a judge or jury to glean. They cannot be entirely shut out. But then:

"Who made the heart, 'tis He alone
Decidedly can try us,
He knows each chord, it's various tone,
Each spring, it's various bias."

The courts hold a party to have waived objectionable testimony, in jury trials, unless exception is taken at the time it is offered; and in chancery causes, unless the exception be renewed at the hearing. There is an apparent valid reason for applying it to objectionable testimony in chancery causes; the objection once taken there should be sufficient.

There are at least two objectionable practices in vogue in taking proof in chancery causes which ought, as far as possible, be eliminated. And they are, First, Voluminous and impertinent matter and Second, captions, or other exceptions interlarded all

through both direct and cross-examination; the latter applies in part to jury trials. Fault of counsel is at the bottom of both of them and to be remedied, if at all by counsel, and can not be remedied by adjournment of a cause from the office of a notary to the presence of the judge in open court, for the latter would simply be a forum for laying the foundation for getting it in or out, elsewhere. More often than otherwise, exception is taken to a question before a notary for the sole purpose of warning a litigant or partisan witness, that a true answer will prejudice, plaintiff or defendant, as the case may be, and give a witness time to parry the thrust. In chancery causes especially why not let the witness, whether on direct or cross-examination, tell his story uninterrupted and then note only such exceptions as seems proper? You can't stop the witness by objecting, why interrupt him till he is through? Why may we not, by taking thought, in the way suggested, or some other way, add a cubit to our stature under the present chancery practice, and thereby aid the judge and jury in promoting the ends of justice, even though we stand with our client on the light side of the balance?

JAMES A. BENT.

Elkins, W. Va., August, 1910.

Futile Dissension.

"So you and your wife are always quarreling?" said the family lawyer.

"Yes," answered the young woman.

"What do you quarrel about?"

"I forget the subject of the first quarrel. But we have been quarreling ever since over who was to blame for it."—*Washington Star*.

"Married women, we all know, constantly sign deeds, against their judgment and wishes, only to gratify the requests of their husbands, and to avoid the discomfort and annoyance which a refusal would cause, and solemnly acknowledge before an officer on a private examination that it is done of their own free will." *Per* Chancellor Zabriske in *Derby v. Derby*, 21 N. J. Eq. 36, 49.

WAS THE GOVERNOR RIGHT.

TO THE BAR:

I laid away a copy of the December, 1909, issue of *The Bar*, intending to reply at some future date to an article in that number entitled "Celerity of the Courts vs. The Methods of the Mob." As the article in question relates to matters justifying calm consideration, I have waited for several months in order that the matters which inspired that article might be fully considered and disposed of.

The article in question contained the following three paragraphs: "Now, therefore, is it not practicable for the courts, while maintaining a due deliberation and carefulness in the administration of the law, to recognize at such times when the moral sense of a community is shocked by the enormity of a crime and there is a righteous indignation that is distinctly vindictive toward the perpetrator—and justly so—that the courts should move one step forward toward meeting this sentiment?"

"By way of illustration, if Governor Glascock, after taking those criminals referred to out of the hands of the mob, had busied himself to bring about a speedy trial, we would have all hailed this new departure as a most complete and distinct advance in the administration of justice.

"Does not the heinousness of the crime in question justify a departure from the established periodicity of the courts, and the calling of a special session to avenge an outraged public sentiment and vindicate our claim to a decent civilization?"

I, for one, cry out against this "new departure" advocated by the Bar and hail this "distinct advance in the administration of justice" as a new departure of *mob* law. I believed at the time, and still believe, that our Governor was right when he refused to use the prerogatives of his high office for the purpose of calling a special term of the court to try prisoners for a heinous crime in a community which showed that the mob spirit was rife, and which would prevent the prisoners from obtaining a trial by a jury of their peers free from bias or prejudice.

Every person charged with crime must be regarded as innocent until he has been convicted and such conviction confirmed by the highest court to which the case is appealed. Now, let us just view the situation in this light. Here are men presumably innocent but charged with crime. The mob spirit is rife in the community, as was attested by the fact of the Governor being required to call out the militia to quell a riot of hundreds of citizens in that county bent upon committing murder according to their own fancy.

A number of people present on that occasion refused to perform a legal duty to the performance of which they were duly sworn. Would they regard a second oath with more solemnity during the period of that excitement? The people of that community make up the jury by which these persons charged with the crime are to be tried. How could these parties obtain a fair and impartial trial by an immediate special term of the court called for the purpose? While people thirst for blood what difference does it make whether they are out in the open or in the court room? Tens of thousands went through the form of trial during the French Revolution, but what difference did the trial make, they were all adjudged guilty. Taking a man into the court room does not appease his thirst for revenge, as all practitioners can attest. In fact addresses by lawyers during the trial of criminal cases inflame rather than appease the mob spirit. In my humble judgment, the only practicable way by which a man charged with crime may obtain a fair and impartial trial in a county or community in which the mob spirit is prevalent is to wait until the spirit has subsided. While this mob spirit is prevalent, no man against whom this fury is directed, should be tried for a crime by a court of justice at its regular term, or a term called specially for the purpose. To convene court out of its regular order to appease a mob, or a mob spirit, is simply to let the mob have its way—like a spoiled child. It is conducive to the propagation of this mob spirit.

As soon as a lot of bad men in a community are taught that the mob, or Moloch, if you please would be ap-

peased in this manner they would make complaint against some man who had been most active against their evil designs, would then contrive to raise a big howl and while the excitement was on obtain one of these speedy trials for the object of their wrath, and railroad the man to death or to the penitentiary.

There was a story in the Bar some time ago of the man who was willing to serve on the jury because Jack Wilson was to be tried at that term of the court, and Jack Wilson had "killed a dorg of mine onct."

I shall never give my approval to the convening of a special term of court for the purpose of appeasing the wrath of a mob. The course of conduct of our Governor in his action toward that Gassaway affair was right and should be upheld by every voter in the state.

H. W. BAYER,

Mannington, W. Va., July 5, 1910.

A CHINESE PUZZLE.

To The Bar:

July 23, 1910.

I call attention to an annoying omission in the Index to the Acts of 1909:

There is no title "Acts Amended" or "Code Amended," as in previous Acts, and it is, therefore, almost impossible to find what previous Acts or Sections of the Code were changed.

What occasion was there for this omission?

Yours truly J. HOP. WOODS.

The above conundrum comes from an alert correspondent who seems to have "gotten into the brush" this hot weather. He ought not to object to that because it's hot, and too hot on the outside to wrestle with a puzzle such as he presents.

If anybody can give our honored correspondent any solution of the perverse obliquity of the Legislature, in subjecting the legal profession to such adverse conditions during a hot summer as he points out, we hope that person will come to his relief. We give it up.

WHY NOT NOMINATE AND ELECT AT THE SAME TIME?

BY J. WM. HARMON OF THE PARSONS BAR.

TO THE BAR:

The manner of selecting candidates for office is rapidly drifting toward the *primary* idea all over the country. Hence it is apparent to any observer that it will not be long till all candidates will be selected in that way. In fact, it is being done now to a great extent not only in our state, but elsewhere.

It follows from this that unless there is a change in our law or even if there is a change that in each county and in each senatorial, judicial and congressional district, it is likely that we will have primaries to select candidates at the various elections. This means that in election years, even with only the two old parties, there will be held two general primaries and then a general election in one year.

Election year is generally a business disturber, and with at least three elections in such year, it can be seen that we can figure on a general disturbance of business for a period of some 8 to 10 months, and this, at least once in every two years under our present system.

The fact is, that in this very year we have been holding primaries in different counties for several months past and are yet not through. They will keep on up till the limit under our law, and then follows the general election which means a further turmoil of months.

This is a burden to the candidates (especially to their pocket books); is grating to the peoples' nerves, and tends to graft and corruption, and should be stopped if possible.

Our country is governed by parties and why not hold the primaries and general election on the same day, at the same time, by the same officers, and under the same restrictions as our general elections are now conducted?

Can it be done? Yes. Take my county for instance: Suppose we have 3000 voters of all parties. Of this number, there are 1500 Republican; 1200 Democrat and 300 Prohibition. All these parties are allowed equal representation on the election

boards; the names of candidates for the different offices are put upon a separate ticket of each party.

A voter on entering the polling place announces his party affiliation, and if known to belong to that party or makes such affidavit as may be required by the board, is given his party ballot and he enters his booth and fills out his ticket and returns it to the commissioners as is now done. On closing the polls and counting the ballots (I mean after the entire vote of the county is turned in) it is found that the vote cast by the respective parties is as given herein. From such return it is apparent that the Republican party is decidedly in the majority in the county. Now, why should not the candidates receiving the highest vote for each office on the Republican ticket be declared elected?

Party committeemen could be selected at the same time; the chairmen of the committees of each county could be made to constitute the State Committee, and the state committee could meet each campaign year and make up and publish a platform of principles.

This method of nominating and electing officers would relieve the candidates from assessments to defray the expenses of primaries; would save candidates a great deal of turmoil, expense and time; would make the election one public expense and without increasing such expense to any appreciable extent over that under present conditions, and, by saving to the candidates so much time and expense, would lessen the probability of their selling out in office in order to make up their losses. Moreover it would bring out the full vote at each election as every one would realize that the one election settles it, and would make the voters more careful in their voting; and of course, would remove the possibility of defeat after nomination.

Some may object to the latter proposition and say that such method would deprive the people of the opportunity to "weed out" objectionable nominees. That is possibly true, but that very fact, would make people more careful, and avoid lots of "trading."

Of course this idea could hardly be carried out successful-

ly without reforming our election laws to a large extent, and this article is only written to suggest the general idea, and not with a view of particularizing as to methods to be followed.

I fully realize that objections may be found; but it seems to me that the method is so much superior to the present plan and would likely accomplish so much good generally that the suggestion is worth consideration.

The Distance.

The Reading railway's lawyer was cross-examining a negro woman who had sworn that she saw the train hit a milk wagon whose bandaged driver had just testified. No she had not heard the engineer blow the whistle.

"How near were you to the train?" the lawyer asked her, sharply.

She didn't know exactly.

"But how far?" the lawyer persisted. "A mile or a square or what? How long would it have taken you to walk the distance?"

"Suh," the witness replied, haughtily, "dat would depend entirely on my speed."—Philadelphia Times.

" 'Now, Calhoun, I want you to understand the importance of telling the truth, the whole truth, and nothing but the truth in this case.' "

" 'Yes, sah,' said Calhoun.

" 'You know what will happen, I suppose, if you don't tell the truth?' "

" 'Yas, sah,' said Calhoun, promptly. 'Our side'll win de case.' "

His Excuse.—A Virginia attorney who held for collection a note given by a negro received from the debtor the following explanation of his delinquency: "Owing to the unsettled can-descent inclemency of the weather and to the defalcation of the operation of the sawmill, my inability to meet my money demands has proved faultless."

"Plenty of men will die for their country, but the man who will live for his city and state every day is the man the government needs."

**Address of Mr. Waitman H. Conway,
Of Fairmont, West Virginia
Delivered Before the Marion County Bar Association
June, 30 1910**

**SUBJECT: "WEAKNESS OF LAND TITLES OWNED BY WOMEN
AND SUGGESTING LEGISLATION CURING SUCH DEEDS AS ARE DEFECTIVELY
ACKNOWLEDGED."**

MEMBERS OF THE BAR ASSOCIATION:

The theme and scope of this address will deal exclusively with the weakness of West Virginia laws relative to land titles, owned by married women, offering a few suggestions looking to their improvement by curing such deeds as are defectively acknowledged.

I have been interested in this particular subject for several years and trust my effort on this occasion may convince my brother members of the bar of the manifest weakness of our state laws on this subject and impress upon them the importance of bringing about some much needed amendments and reforms.

One of the freaks known to the legal profession in West Virginia is called the married woman's law.

That married women in this state own and hold title to much valuable real estate is well known.

There can be no more important question to the land owner than the guarantee of title and possession which the law is intended to afford him. It is the object and province of the law to lend its aid in his protection.

At the common law she could not take and hold title to real estate, nor dispose of the same.

Her right to hold and convey real estate was then, and is now, largely, if not entirely, regulated and controlled by state legislation. She can now only hold and convey title in so far as her right is prescribed by the statute laws of the State, and only in the precise mode in which the statute authorizes her to do.

Formerly, under Code 1868, Chapter 73, Section 6, she could only pass title to her estate by privy examination, acknowledgement and declaration as provided by that chapter; and the instrument of writing affecting her title and conveyance had no effective legal operation until the conveyance was recorded in the County Clerk's Office.

By act of the West Virginia Legislature, 1891, a privy ex-

public at large. that a married woman is not bound under our amination and declaration by her, and the recordation of the instrument, as prerequisite to the operation thereof, were dispensed with. but that act does not dispense with an acknowledgment by her of a deed of conveyance in which her husband joins. She can now only hold and convey title as provided by the act of the legislature 1893, Chapter 3, Section 3.

The act of 1893 did not remove all her common law disability, save it enlarged her capacity to contract, and made her amenable to the jurisdiction of the common law court for the enforcement of her contract as she never had been until the act of 1893.

This is the interpretation placed upon this question by our State Supreme Court in the case of *Rosenour v. Rosenour*, 47 West Virginia Report, page 561, and in the case of *Williamson v. Kline*, 40 West Virginia Report, page 194.

It is not generally known to the legal profession, and the state law by reason of the covenants of warranty contained in her deed conveying real estate, and cannot be held responsible therefor should her title fail.

If a man executes a deed, and the title fails by reason of the covenants of warranty in his deed, he can be compelled to make good the loss suffered by his grantee. Not so with a married woman. She may be worth a million dollars and convey land worth only one hundred dollars to a man of moderate means and her title fails. In this instance the poor man loses the consideration paid and the law of the state exempts the wealthy married woman from liability by reason of the covenants of warranty in her deed, and she cannot be compelled to make good the loss.

Section 6 of Chapter 73 of the Code provides. that the deed of a married woman shall operate to pass all her right, title, estate and interest which she may have in the real estate conveyed, but "such writing shall not operate any further upon the wife, or her representatives, by means of the covenants of warranty therein contained."

This provision of the statute has received interpretation by our Supreme Court in the case of *Sine v. Fox*, 33 West Virginia Report, Page 521, in which the court says:

"Where a husband unites with his wife in a deed conveying with covenants of general warranty, land of the wife. in which the husband has a freehold estate, the warranty in the deed will not bind the wife, but is obligatory upon the husband alone."

And in the case of *Bennett v. Pierce*, 45 West Virginia Re-

port, page 654, the same court decides that the provisions of the statute extend to the deed of a married woman living separate and apart from her husband and conveying her sole and separate estate.

It only requires a brief consideration of the subject to see how unjust this law is and how it protects the female grantor in preference to the male grantor, and what a weakness it creates in the chain of land titles where the title has passed through a married woman.

A married woman should be bound by the covenants of warranty in her deed conveying land the same as a man. There is no good reason to be urged against it. She can be made liable by amending the provisions of the statute law referred to. If this is not soon done it will prove to be an encouragement to grantors to have their title placed in the name of their wife to avoid responsibility. If done, it will cure a serious weakness now existing in the land title laws of the state and give to innocent grantees additional security against married women who are financially able to make good the losses in this behalf sustained at their hand.

I have been encouraging the enactment of such a law since the year 1905. A bill for this purpose was introduced in the Legislature in 1906, but had to give way to business of more importance.

I have not been advised of the enactment of any law covering this loophole in land titles since I began the agitation in favor of such a law in the year 1905.

CURING DEFECTIVE ACKNOWLEDGMENTS.

Another serious question to be considered in this connection is the failure of land titles growing out of defectively acknowledged deeds of married women under our statute law as it existed prior to the act of 1891.

In recent years a large percentage of litigation in this state has grown out of questions affecting conveyances by married women of their separate real estate, the acknowledgments to such conveyances being defective, and sometimes wholly void, because the officer taking the acknowledgment having omitted from the form of his certificate some one or more of the essential statutory requirements.

In nearly all such cases the land has been bona fide sold and the full consideration paid. A good and sufficient deed, except in form of acknowledgment, has been properly signed by the grantors, who have appeared before a notary public, justice of the peace, or other officer, given their assent and acknowledged the

conveyance in compliance with the law in so far as they are required to do. The deed has been delivered to the grantee who has taken possession of the land, paid the taxes thereon and made permanent and valuable improvements. The deed has also been recorded in the proper clerk's office. After the transaction has been accepted and acted upon in good faith for a great number of years the news is broken to the former grantors by attorneys that the deed made by them is defective, and does not pass the full title to the land, through the carelessness or ignorance of the officer in failing to attach to the conveyance a proper form of certificate of acknowledgment.

It must be borne in mind that in all such cases the grantor and grantee have done all that the law required of them. They believed at the time of the transaction that their deed was good. It was so understood and acted upon by all the parties. The title does not fail for any cause on the part of the grantor or grantee, or the weakness of the body of the conveyance, but arises from the carelessness or ignorance of the officer when performing his duty which is independent of the act of the parties and no part of the body of the deed.

My suggestion is that the legislature of West Virginia should be persuaded to pass a bill curing all such defectively acknowledged conveyances before innocent purchasers suffer any further loss, and in this way cut out the claims of dishonest grantors who have once received the full value for the property conveyed and were satisfied with the transaction at the time it occurred.

Unless the grantors in such old conveyances are honorable persons, and willing to correct the same without expense, and as in justice and right they should do, litigation is almost sure to follow, and in many cases a bona fide purchaser of land, who has once paid the full value for it, will be called upon to again pay, in the nature of blood money, or may be compelled to forfeit his title and be ejected from the premises without any recourse whatever, so far as the married woman is concerned.

We must not lose sight of the fact that the body of the instrument of writing is not to be altered or impaired by such legislation and that we only propose to deal exclusively with the certificate of the officers appended to the instrument, the form of which has been prescribed by the statute law of the state.

For many years some leading attorneys of this State have doubted the constitutionality of such curative laws claiming they would be in conflict with Section 10 of Article 1 of the 5th and 14th amendment to the Federal Constitution, which, in substance

as far as applicable to these questions, provide: First, that no state shall pass any law impairing the obligation of contracts; second, that no person shall be deprived of property without due process of law; Third, that no state shall deprive any person of property without due process of law; and fourth, that such legislation would disturb vested rights.

By a brief review of such curative laws, and a consideration of these four distinct propositions, together with such other collateral and incidental questions as might be raised, I believe I can persuade them in the belief that all such questions have received judicial interpretation by the Supreme Court of the United States wherein such laws have been upheld and encouraged.

The statute laws of West Virginia, including forms of acknowledgments, were copied from the Virginia statutes as they existed prior to 1868 and since.

In 1892 Virginia enacted a curative land title law validating defectively acknowledged deeds found in her land titles. It will be found in Section 2298 of the law of that State.

In the year 1826 the general assembly of Pennsylvania enacted such a law.

In the case of *Watson v. Mercer*, 8 Peters 109, the foregoing questions were raised and the constitutionality of the Pennsylvania act was called into question and held by the Supreme Court of the United States to be constitutional.

Mr. Justice Story, in delivering the opinion of the court, says in part:

"In our opinion the act supposes the titles of *femes covert* to be good, however acquired; and only provides that deeds of conveyance made by them shall not be void because there is a defect in the acknowledgment of the deed by which they have sought to transfer their title. So far then as it has any legal operation, it is good to confirm and not to impair the contract of *femes covert*. It gives the very effect to their acts and contracts which they intended to give and which from mistake or accident has not been effected. This point is fully settled by this Court in the case of *Satterlee v. Mathewson*, 2 Peters (U. S.) 380, and it is wholly unnecessary to go over the reasoning upon which it is founded."

In the case of *Randall v. Kreiger*, 23 Wallace 149, after approving the doctrine laid down in the cases of *Watson v. Mercer*, and *Satterlee v. Mathewson*, to which I have referred, the Supreme Court of the United States holds:

"The right which the curative or repealing act takes in such case is the right in a party to avoid his contract, a naked LEGAL RIGHT which is usually unjust to insist upon, and which no constitutional provision was ever intended to protect.

"To the objection that such laws violate vested rights of property it has been forcibly answered that there can be no vested right to do a wrong. Claims contrary to justice and equity cannot be regarded as of that character. Consent to remedy the wrong is to be presumed. The only right taken away is the right acquired to repudiate an honest contract or conveyance to the injury of the other party. Even where remedy could be had in the courts the vested right is usually unattended with the slightest equity. The curative act of 1857 has a strong natural equity at its root. It did for her what she attempted to do or intended to do, and doubtless believed she had done, and for doing which her husband was fully paid. The Legislature thus did what right and justice demanded, and the act strongly commends itself to the conscience and approbation of the judicial mind.

"The power of the Legislature under the circumstances of this case to pass laws giving validity to past deeds, which were before infectual, is well settled."

Another leading authority on this subject is Cooley on Constitutional Limitations. At pages 462 to 479 he says:

"One method in which beneficial interests are protected by legislation is by a retrospective correction of errors and defects in conveyances. A leading case on the subject is one in which a statute was passed to validate certain leases of land which under previous judicial decisions had been declared inoperative. By express terms of the statute it was made applicable to pending suits in which contracts of leasing might come into question. It was sustained as undoubtedly valid, although it was contested as a law impairing the obligation of contracts. Manifestly, it had no such effect as pretended, as it rather imparted into the contract an obligation which the parties had attempted, but failed to incorporate in it. And this is the principle on which all such laws may be sustained; they merely give legal validity to what the parties have attempted to accomplish; converting their invalid agreements into the valid conveyance which they undertook to make. Presumptively therefore, these laws further the intent which the parties had in view.

"It may happen that the grantor in an invalid conveyance, when he finds that the title has not been transferred, may desire to take advantage of the invalidity, and may insist that he

has a vested right which the Legislature cannot take away. But obviously he has in such a case no equitable right. In equity he is considered as holding for the benefit of the party to whom he undertook to convey; and, as has been said, "courts do not regard rights vested contrary to the justice and equity of the case."

"This principle has been applied to conveyances of married women, and they have been validated retrospectively, though they were so entirely void in their origin that they did not even constitute a contract, or raise an equity which could be taken notice of judicially."

In the case of *Goshorn v. Purcell*, 11 Ohio State Report, page 641, the court holds:

"The act of the married woman may, under the law, have been void and inoperative; but in justice and equity it did not leave her right to the property untouched. She had capacity to do the act in a form prescribed by law for her protection. She intended to do the act in the prescribed form. She attempted to do it, and her attempt was received and acted upon in good faith. A mistake subsequently discovered invalidates the act; justice and equity require that she should not take advantage of the mistake: she has therefore no just right to the property. She has no right to complain if the law which prescribed forms for her protection shall interfere to prevent her reliance upon them to resist the demands of justice."

The States of Florida, Ohio, Virginia, California, and Pennsylvania have enacted curative land title laws. There may be other states which have adopted such laws, but I have not investigated as to them.

In the constitution of some of the states there is a provision against the passage of any retrospective laws, but no such provision is to be found in the constitution of the State of West Virginia. There is, however, a provision in our constitution against the passage of any *ex post facto* laws, but they being of a criminal and penal nature bear no relevancy to this subject.

I have in my possession the form of bills enacted in many of the states.

By a close reading of the cases to which I refer it will be found that all possible objections to such acts have been settled by the highest judicial tribunal in the United States, that is, the Supreme Court of the United States.

There is no state in the union where the value of real estate in the past few years has increased as rapidly as it has in West Virginia. This is particularly true in the MINERAL

counties. It is also well known that many new towns and cities have recently grown up in what was formerly termed the interior section. What was a few years ago suburban land has now become valuable town and city property.

As the years go by and this property exchanges hands the number of titles multiply, and more people are affected, and each day the importance of the subject increases.

The careful manner in which land titles are now investigated and abstracted, compared with the practice of twenty years ago, has brought to light many cases furnishing forcible endorsement of the reasons and justness supporting the measures suggested.

When I presented the bills to the legislature of 1906 they were vigorously opposed by attorneys who happened to be members of that body on the ground that they would discourage and minimize legal controversies and take business away from the profession.

That such laws would minimize vexatious litigation, based on dishonest claims sought to be enforced, and defeat suits which never should have been instituted, no one will doubt, but to the extent that they would take business away from the profession, such laws should be encouraged, not only because of the justice and natural equity at their root, but because of the demoralizing effect the prosecution of such claims have on our profession through the inducements presented to that abominable class of attorneys known as shysters and shylocks, 'who are prone to prowl in courts of law for human prey.'

When carefully investigated it will usually be found that the legal representation in the prosecution of such cases is not one of pure employment, for a stated fee, but on a contingency basis, under which the attorney instituting the suit either directly or indirectly shares in the recovery of the actual property sought to be dishonestly taken from an innocent purchaser. When on a contingency basis the attorney in reality becomes a party plaintiff to the prosecution of the suit because of his personal interest in the outcome.

There has known to be instances in which good women, possessed of a high sense of honesty and duty, have expressed a desire to compromise such cases after being made fully acquainted with all the circumstances and realizing the unconscionable basis of their claim, but were prevented from so doing because of the employment agreement which they had previously made with their attorney, who would not let them compromise, insisting that the matter was entirely and exclusively in his hands. In this instance the attorney prevents his client from doing what

she believes to be right, and what she would otherwise do, were it not for the fact that she has fallen under the influence and control of the attorney through contract of recovery made with her.

It is under this form of contingent employment that the profession, as a class, must suffer. In the language of the United States Supreme Court in the case of *Randall v. Kreiger*, the claim of the plaintiff in such cases is usually based upon an effort to enforce a right dishonestly acquired to repudiate an honest contract or conveyance, to the injury of the other party, and it is when the attorney lends his talents and efforts in the prosecution of such suits with the hope of ownership in the property to be acquired, through contingent recovery, that the integrity and standing of the profession is called into question.

Aside from the observations here presented, the contention of that class of attorneys who insist that such legislation would take business away from the profession, has been forcibly and completely answered by the action of the American Bar Association.

At the 1908 meeting of that association a committee composed of fourteen of the most distinguished judges and lawyers of America,—of which Hon. David J. Brewer, of the Supreme Court of the United States, Hon. Alton B. Parker, of New York, and Henry St. George Tucker of Virginia, were members,—were appointed to report to that body for its adoption, and which it adopted, a canon of professional ethics.

Under rule number twenty-eight this subject is dealt with in the following language:

“It is disreputable to hunt up defects in titles and other causes of action, and inform thereof, in order to be employed to bring suit, or to breed litigation.

A duty to the public and to the profession devolves upon every member of the Bar, having knowledge of such practices upon the part of any practitioner, immediately to inform thereof, to the end that the offender may be disbarred.”

In this connection Ex-President Abraham Lincoln has said:

“Discourage litigation. Persuade your neighbors to compromise whenever you can. Point to them how the nominal winner is often a real loser in fees, expenses and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. Never stir up litigation. A worse man can scarcely be found than one who does this. We can be more nearly a friend than he who habitually overhauls the register of deeds in search of defects in titles, whereupon to stir up strife

and put money in his pocket? A moral tone ought to be enforced in the profession which would drive such men out of it."

When Honorable Charles W. Campbell, of Huntington, was here in connection with the hearing of the King Land Cases, some two years ago, I mentioned to him the importance of this subject, and furnished him with a copy of the printed pamphlet which I had circulated in 1905 when attempting to create an interest in the matter. He became so interested that at the State Bar Meeting of July, 1909, he delivered an address on the subject.

So important has it now become that the Committee on Judicial Administration and Legal Reform of our State Bar has taken it up and reported a bill to be considered at the State Bar Meeting in July of this year at White Sulphur Springs.

I cannot agree with the form of bill to be presented at the bar meeting and suggest that one be framed following more closely the Act of the Virginia Legislature, enacted some years ago, which has withstood the attacks of attorneys and judicial interpretation. As our laws were copied from Virginia, the judicial interpretation placed upon the act of that state, up to this time, would to that degree apply to the act to be passed by this state.

In conclusion I would respectfully suggest, that West Virginia should pass some curative legislation along the lines suggested giving to property owners of this state that full measure of protection which the spirit of the law intends they should have, and which rightfully belongs to them, but sorry to say they do not possess at this time.

The End Was Missing.

An Irishman on board a man-of-war was ordered to haul in a two-line. After pulling in forty or fifty fathoms, he muttered to himself:

"Surely it's as long as to-day and to-morrow. It's a good week's work for any five men in the ship. Bad luck to the leg or the arm it'll leave at last. What, more of it yet? Och, murder! The say's mighty deep, to be sure!" After continuing in a similar strain he suddenly stopped short, and, addressing the officer, exclaimed: "Bad manners to me, sir, if I don't think somebody's cut off the other end of it! It's missing."

"Disregard the one law breeds disrespect for all law. In allowing some laws to go unenforced we reap a harvest in having all laws broken."

INJURY FROM MENTAL SUFFERING OR FRIGHT.

The opinion of the Court of Appeals of Maryland in *Green v. T. A. Shoemaker & Co.* (June, 1909, 73 Atl.' 688) treats generally of the mooted question of liability for mental suffering produced—and its consequences—without direct physical contact. It was held that if fright was a reasonable and natural result of blasting operations near a person's dwelling, and the person was actually put in fright thereby, and injury to her health was a reasonable and natural consequence of the fright and was actually and proximately occasioned, she could recover for the injury.

It was further held that in an action for physical injuries alleged to have resulted from fright because of blasting near plaintiff's residence, where plaintiff was 30 years old, in sound health and free from any nervous disorder or tendency before the blasting began, which shattered the roof, walls and windows of the house by night and day, and caused her constant fright, and she afterwards was afflicted with nervous prostration, in the absence of evidence of any other cause therefor the question whether the fright was the proximate cause of the nervous condition was for the jury.

Without acceding to its view that the consideration of expediency is not sufficiently strong to be controlling in this class of litigation, we nevertheless deem it proper to bring to the attention of the Bar the forcible argument of the Maryland court in the following language:

"We now come to the question of expediency. It appears from an examination of the cases in which the right of recovery has been denied where there has been no physical impact that this doctrine has been the controlling one with the court. This is especially apparent in the Pennsylvania and Massachusetts decisions. In *Huston v. Freemansburg* (212 Pa., 548, 61 Atl., 1022, 3 L. R. A., N. S., 49) the court dealt only with that question and said: 'If we opened the door to this new invention the result would be great danger, if not disaster, to the cause of practical justice.' In *Homans v. Boston El. R. W. Co.* (180 Mass., 456, 62 N. E., 737, 57 L. R. A., 291, 91 Am. St. Rep., 324) Chief Justice Holmes said, referring to the rule established in that court: 'As has been explained repeatedly, it is an arbitrary exception, based upon a notion of what is practicable, that prevents a recovery for visible illness resulting from nervous shock alone. * * * We must recognize the logic in favor of the plaintiff when a remedy is denied because the only immediate

wrong is a shock to the nerves." At the trial below the defendant by various requests tried to press the principle so far as to require the plaintiff to prove that the nervous shock was the immediate consequence of a slight blow received by being thrown forward against a seat, whereas the judge allowed her to recover for the nervous shock ending in paralysis, if it resulted from a jar to her nervous system which accompanied the slight blow to her person. In other words, the court held that it was not necessary to show that the shock was the consequence of the blow; and Judge Holmes said: 'We are of the opinion the judge was correct, and that further refining would be wrong.' This case well illustrates the difficulty felt by the court in denying a recovery upon the ground of expediency without withholding from the plaintiff a legal right. The argument from mere expediency cannot commend itself to a court of justice resulting in the denial of a logical legal right and merely in all cases because in some a fictitious injury may be urged as a real one. The apparent strength of the theory of expediency lies in the fact that nervous disturbances and injuries are sometimes more imaginary than real, and are sometimes feigned but this reasoning loses sight of the equally obvious fact that a nervous injury arising from actual physical impact is as likely to be imagined as one resulting from fright without physical impact, and that the former is as capable of simulation as the latter. It must be conceded that the numerical weight of authority supports the general rule that there can be no recovery for nervous affections unaccompanied by contemporaneous physical injury, but the sounder view in our opinion, is that there are exceptions to this rule, and that where the wrongful act complained of is the proximate cause of the injury within the principles announced in *Kemp's case* (61 Md., 80,) and where the injury ought in the light of all the circumstances to have been contemplated as a natural and probable consequence thereof, the case falls within the exception and should be left to the jury. In England, in *Victorian R'y Commissioners v. Coultas* (L. R., 13 App. Cases 222,) the court held that damages arising from mere terror unaccompanied at the time by any physical injury could not be considered as a consequence of the wrongful act there complained of, although the court refused to decide that in no case could recovery be had without proof of actual impact. In *Bell v. Great Northern R. R.* (26 L. R. Irish, 428,) the court refused to follow the case just mentioned, saying that where no intervening independent cause of the injury was suggested, and where the jury could find that the bodily injury complained of was a natural consequence of the fright, the chain

of reasoning for recovery was complete. These cases are reviewed in 1 Beven on Negligence (2d ed., pp. 76-83,) and the doctrine of the former is criticized with much force and discrimination. In *Watkins v. Kaolin Mfg. Co.* (131 N. C., 536, 42 S. E., 983, 60 L. R. A., 617) the action was brought to recover damages for injury to the nerves resulting from blasting near the plaintiff's dwelling, though there was no external physical impact. It was held that an allegation that plaintiff became so nervous and frightened from the negligent and reckless blasting by the defendant that she could not sleep at night and was greatly disturbed in body and mind stated a good cause of action for physical injury, and it was held that an action will lie for physical injury or disease resulting from fright or nervous shocks caused by negligent acts. In *Denver R. R. v. Roller* (100 Fed., 738, 41 C. C. A., 22, 49 L. R. A., 77) the jury was instructed as follows: 'If great fright was a reasonable and natural consequence of the circumstances in which the collision aforesaid, and the ensuing wreckage, explosion and conflagration, placed the plaintiff, and if she was actually put in fright by those circumstances and injury to her health was a reasonable and natural consequence of such fright, and was actually and proximately occasioned thereby, then said injury is one for which damages are recoverable.' The reasoning upon which that conclusion was reached is in our opinion sound, and it is in accord with the views expressed in *Sedgwick on Damages* (8th ed., sec. 861,) *Addison on Torts* (5), 3 *Sutherland on Damages* (714, 715.) The same view was held in *Tuttle v. Atlantic City Ry.* (66 N. J. Law, 327, 49 Atl., 450, 54 L. R. A., 582, 88 Am. St. Rep., 491.) in *Watson v. Dilts* (116 Iowa, 249, 98 N. W., 1068, 57 L. R. A., 559, 93 Am. St. Rep., 239,) in *Mack v. South Bound R. R.* (52 S. E., 323, 29 S. E., 905, 40 L. R. A., 679, 68 Am. St. Rep., 913,) in *Purcell v. St. Paul City R. Y. Co.* (48 Minn., 134, 50 N. W., 1034, 16 L. R. A., 203,) in *Gulf, Col. & Santa Fe R. W. Co. v. Hayter* (93 Tex., 239, 54 S. W., 944, 47 L. R. A., 825, 77 Am. St. Rep., 856,) and in *Consolidation Traction Co. v. Lambertson* (59 N. J. Law, 297, 36 Atl., 100.) It may be observed here that there is a class of cases in which courts which generally sustain the contrary rule seem not to require contemporaneous physical injury in order to sustain a recovery for fright and its consequences. In *Spade v. Lynn R. R.* (168 Mass, 285, 47 N. E., 88, 38 L. R. A., 512, 60 Am. St. Rep., 393.) where a recovery was denied, the court said, 'We do not include cases of acts done with gross carelessness or recklessness showing utter indifference to such consequences when they must have been in the actor's

mind.' In *Nelson v. Crawford* (122 Mich., 466, 81 N. W., 335, 30 Am. St. Rep., 577.) it is intimated that the rule does not reach those cases where there is an intention to cause mental distress, and in *Wilkinson v. Downton* (1897, 2 Q. B., 57) it was expressly so held where a practical joke resulted in fright producing miscarriage. In the case before us the evidence is that the defendants were notified of the injury to the house and they made some repairs, but that the blasting continued thereafter and during all the summer with the same results. This would seem to come fairly within the description of gross recklessness as to consequences, and thus to bring the case within that exception.

In view of all the circumstances of this case we cannot apply to it the rigid rule applied in some courts requiring actual contemporaneous physical impact producing physical injury, and we are of opinion that the case should have gone to the jury upon the principles announced in *Denver F. R. v. Roller* (supra.) It will be for the court in future cases of this character, as in all other cases where the questions of proximate cause and legally sufficient evidence arise, to permit no recovery except upon the application of the principles just mentioned, while denying none upon the ground of mere expediency, where these principles logically require the submission of the case to the jury."

Uncle Mose, needing money, sold his pig to the wealthy Northern lawyer who had just bought the neighboring plantation. After a time, needing more money, he stole the pig and resold it, this time to Judge Pickens, who lived "down the road a piece." Soon afterwards the two gentlemen met and, upon comparing notes, suspected what had happened. They confronted Uncle Mose. The old darkey cheerfully admitted his guilt.

"Well," demanded Judge Pickens, "what are you going to do about it?"

"Blessed ef I know, Jedge," replied Uncle Mose, with a broad grin. "I'se no lawyer. I reckon I'll have to let yo' two gen'men settle it between yo' selves." —Everybody's.

"It seldom occurs, as experience teaches that a child sues a parent, whatever the wrong or the right of recovery, and, when it is done, so unnatural an act renders the child odious to the community.' *Per Walker, J.* in *Ryder v. Emrich*, 104 Ill. 470, 474. *Cristman v. Cristman*, 36 Ill. App. 568, a man sued his mother for slander and obtained a verdict for \$1,600.

THE GREATEST OF LAWSUITS.

At the Permanent Court of Arbitration in The Hague thirty-five lawyers are engaged in the trial of the greatest lawsuit in the world. Whether wars shall become less and less frequent and finally cease altogether; whether the powerful nations of the earth shall ever be able to obtain relief from the intolerable burden of increasing armaments on land and sea; whether the sword shall ever really give place to the plough-share without the sacrifice of national honor in international disputes—these are questions which will largely be answered by the conduct of the North Atlantic coast fisheries arbitration now pending at The Hague and the outcome of that supremely important litigation.

In computing the entire number of those concerned in the case at thirty-five we include not only the Judges and the senior and junior counsel and attorneys but the secretaries, clerks and assistants of every grade named in the official protocol or bulletin of the proceedings. The Judges are five in number. The president of the tribunal is Mr. H. Lammasch, an eminent Austrian publicist, who holds a professorship in the University of Vienna and is a member of the upper house of the Austrian Parliament. It is to be noted that he bears no title, but is designated in the official record simply as Mr. Lammasch. Next in order of precedence in the protocol comes his Excellency A. F. de Savornin Lohman, Minister of State of the Netherlands and member of the second legislative chamber in that country. The third arbitrator is the Hon. George Gray of Delaware, one of the Judges of the United States Circuit Court of Appeals, recognized as one of the ablest lawyers on the Federal bench. Canada is represented on the tribunal by Sir Charles Fitzpatrick, the Chief Justice of the Supreme Court of the Dominion, and the fifth Judge is Mr. Luis Maria Drago, formerly Minister of Foreign Affairs in the Argentine Republic, who is probably the most distinguished jurist that South America has ever produced.

The leading counsel on the American side is Senator Elihu Root of this State. The leading counsel for Great Britain is Sir William S. Robson, the Attorney-General of England. Great Britain holds the affirmative of the case. The argument was opened on June 6 by Sir Robert Finlay, K. C., and will be closed perhaps two months hence by Mr. Root. Then will follow the deliberation of the Judges and their decision. The volume of the documentary evidence to be submitted to them is immense,

and an adequate analysis, discussion and consideration of it will involve the exercise of the most painstaking industry and the highest legal and judicial ability.

We have spoken of the controversy as a litigation and we characterize it as the greatest of lawsuits because we desire to emphasize the distinction between the diplomatic adjustments of international differences which have sometimes been denominated arbitrations, but have not been strictly judicial, and the strictly judicial investigations and determinations which are contemplated in the establishment of the Permanent Court of Arbitration at The Hague. In diplomatic arbitrations considerations of a diplomatic character may enter into and influence or control the award. The arbitrator, a monarch for example, may base his decision upon what he conceives to be the best interest of the parties from the point of view of a broad diplomacy, irrespective of the rules of international law. A judicial tribunal, however, cannot properly deal with questions before it after the manner of diplomatists. It is bound to decide according to the principles, doctrines and rules of law which are applicable to the case in hand, whatever may be the result diplomatically. No other standard can serve as a guide to determinations which will satisfy international disputes; no other will possess a sufficient element of fixity. The canons of international law are none too firmly and clearly formulated and established, but they are capable of fairly intelligible statement and application. The canons of diplomacy, on the other hand, in the case of any particular nation are almost as variable as its interests may dictate.

The essential element of strength in the Permanent Court of Arbitration at The Hague, if it fulfills the anticipations of its founders, is this recognition of law, in its broadest and highest sense, as the touchstone of right and wrong in international controversies. In the North Atlantic coast fisheries arbitration if Great Britain is to prevail it must be because under the recognized rules of international and municipal law as applied to the facts as they shall be found by the arbitrators to exist Great Britain is entitled to prevail; but if the law is with the United States there cannot be a decision in favor of Great Britain merely because the arbitrators may think it would be a better diplomatic arrangement to hand the fisheries over wholly to the Newfoundlanders. The question for the tribunal of arbitration is what are the legal rights of the respective parties, not what is diplomatically best for either.

The text of the address of Mr. Lammash, the president, delivered at the opening meeting on June 1, indicates that his

view accords with that which we have expressed in regard to the character and functions of the tribunal of arbitration and the standards by which it is to be guided in arriving at a decision. "We are fully aware," he said, "that with the end of promoting this peaceful mode of settling international differences the award we have to pronounce must by the force of its motives meet with the approval of all who by their unbiassed knowledge of international law are entitled to criticise us." In other words the test of the correctness of the decision will be its conformity with the rules of international law.

This is a clear and satisfactory recognition of the strictly judicial nature of the lofty task now being performed day by day, with the aid of the highest legal talent which could be assigned them, by the five members of the tribunal of arbitration in the case of the North Atlantic coast fisheries at The Hague.—*N. Y. Sun.*

The too Speedy Trial.

Judge Samuel G. Brown, of Alabama, recently had an opportunity to exert the wholesome influence of judicial restraint on the inflamed public sentiment of the county in which he was holding court. A homicide had been committed in the county and a certain man was charged with the killing. A number of reputable citizens signed a petition asking that the accused be tried at that term of court, and in the petition the homicide was described as "a cold blooded murderer" and language was used showing the highly excited state of the public mind. Judge Brown in denying the petition said:

"If citizens of your intelligence and high standing have such a fixed opinion as that expressed in the petition as to call it a cold-blooded murder, how can the court expect to get a fair and impartial trial of this unfortunate defendant at this term of court? The jurors would more than likely come to court prejudiced against the defendant; the officers of the court, on account of the horror of the alleged crime, would, in all probability, share the sentiment expressed in your petition; the court itself in granting your petition would be guilty of a judicial murder to enter upon a trial before public sentiment had time to recover from the prejudice naturally engendered from heinousness of the alleged crime and the difficulty of getting a fair and impartial jury at this term of court."

"The official who sells his vote is a traitor of peace, more dangerous than traitors of war."

DENIAL OF ADMISSION TO THE BAR FOR WANT OF
MORAL CHARACTER.

That was a rare occurrence in legal circles the other day when the supreme court of New York refused a license to practice law to an applicant therefor on account of his lack of moral fitness. It is common enough to lock the door after the horse is stolen. Disbarment of attorneys is so frequent as to excite little if any comment. But it is so seldom that the courts insist upon moral uprightness as a condition precedent to admission to their bars that an instance of the kind deserves something more than passing notice. The rules for admission of attorneys in New York state require that an applicant shall produce and file with the court "evidence that such applicant is a person of good moral character, which may be shown by the certificate of the attorney with whom he has passed his clerkship, or by some attorney in the town or city where he resides, but such certificate shall not be conclusive, and the court may make further examination and inquiry." The particular applicant above referred to had been guilty, it is said, of a serious moral delinquency during his student days, in that he had held his marriage vows too lightly. Charges having been preferred against him on this score, the court gave him an opportunity to prove himself innocent thereof, but this, a majority of the court held, he failed to do, and he was denied admission to the bar. Such a decision cannot but have a wholesome effect upon those aspiring to become members of the legal profession. More than that, a precedent has been established which the courts upon whom devolves the duty of determining the qualifications for admission to the bar cannot afford to ignore.—*Law Notes.*

Caught Him Right.

A story is told of a Frenchman who was very anxious to see an American business man at his home. The first morning when he called at the house the maid replied to his query, "The master is not down yet," meaning downstairs. The following morning he called again, and was met with "The master is not up yet." The Frenchman looked at her with doubtful eye, paused for a few seconds and said: "Eet ees veery deef'cult, but eef ze mademoiselle will tell me when ze master will be neither up nor down, but in ze middle, zen I vill call zat time."—*Pittsburg Press.*

TAKING DEPOSITIONS.

A Proposition For a Special Judge

TO THE EDITOR OF THE BAR:

I admit the ailment and the seriousness of it, in the body of our laws, touching the practice of our chancery courts—especially as it regards the depositions of witnesses. THE BAR is to be commended for its so persistent and forcible calling of attention thereto. It has waked up several of the learned doctors of the law to the point of writing out their propositions for the case; and now your humble subscriber ventures to give his cure.

Let sec. 11 of ch. 112 of the Code be amended by our next Legislature so as to provide as follows: Let the attorneys resident in and practicing at the bar of each county, on the first day of term of Circuit Court next following the date of this Act taking effect (and thereafter on the last Saturday of December in each year in which the general election of Circuit Judges is held) assemble at the Court House, and elect a special Judge as now provided. Such special Judge to have all the powers as now vested in him, with these additional ones, viz: he shall preside at and certify the taking of depositions in all cases pending in the Circuit Court, and shall have jurisdiction, as at present the special Judge has, in all cases where the Circuit Court Judge certifies that he "cannot properly (or *conveniently*) preside." This special judge to hold his office during the term of the Circuit Judge of the county elected at the last preceeding regular election.

Such an amendment would, I believe, hold good. (See *Minans v. Minans*, 22 W. Va., 678, act at p. 687.) It would undoubtedly relieve our Circuit Courts of a great mass of work, with which they are now burdened and inconvenienced, and would solve the problem you are so worthily interested in.

J. R. D.

Costly Excuse.

The judge stared hard at the accused man.

"You are charged," he said, "with robbing a limburger cheese-factory. Have you anything to say?"

"Judge," the prisoner hoarsely replied, "I was driven to it by hunger."

The judge shook his head portentously.

"Six months at hard labor for the larceny, and six months for the excuse," he growled. "Call the next case."—*Cleveland Plain Dealer*:

The Few Cases Handed Down

By The West Virginia Supreme Court of Appeals Since Adjournment of Wheeling Term.

TENNANT'S HEIRS v. FRETTS ET AL.

Monongalia County. Affirmed.

Williams, Judge.

SYLLABUS.

1. Equity has jurisdiction, at the suit of an owner of land who is in possession thereof under a good legal title, to remove a cloud from his title by a decree cancelling and expunging from the records of the county in which the land is situate, a void deed, or writing constituting a cloud upon, or menace to, his title.

2. The power of a court of equity to grant relief, in such case, is independent of any statute conferring jurisdiction, and rests on general equity principles and practice.

3. A suit to remove cloud and quiet title is local in its nature, and the jurisdiction of the court is determined by the situs of the land.

4. The decree for relief in such suit operates generally, if not always, *in rem*, and need not be *in personam*.

5. The statute, (sections 11, 12 and 13, Ch. 124, Code 1906) providing for service of process on a non-resident by publication, or by personal service out of the state, can not authorize the rendition of a personal judgment, or decree, against a non-resident so served; but it does authorize any court, whether of law or of equity, to pronounce a judgment or decree binding *in rem*, in any case in which such court would otherwise be competent to do so if the defendant were personally served within the state.

6. Equity may, upon service of process on a non-resident by publication, remove cloud from title to land within its jurisdiction by a decree, binding only *in rem*.

WHYEL v. JANE LEW COAL & COKE COMPANY.

Harrison County. Motion to Dismiss Two Appeals Sustained.

Miller, Judge.

SYLLABUS.

1. A motion to dismiss an appeal pending in an appellate court should be in writing and should state specifically the grounds therefor. The notice of such motion, however, is not necessarily the motion itself. If the ground stated therein be too general, yet if in the briefs of counsel filed the grounds be specifically set forth this will amount to a substantial compliance with the rule.

2. On such motion to dismiss an appeal questions involving the merits thereof, or matters to be considered at the hearing cannot, as a general rule, be considered, nor such as require an examination of the whole appeal record.

3. A decree or order made in a pending cause appointing a special receiver of defendant's coal mining plant, directing him to make a complete inventory, and report to the court the advisability of continuing the operation thereof, is by virtue of clause seven, section one, Ch. 135 Code 1906, an appealable order, although such property be then in the possession of a special receiver appointed by another court, and it is provided in such order that the special receiver so appointed apply by petition to the court whose receiver has possession of the property for possession thereof, and that pending action on such petition he do not disturb the possession of the special receiver having such possession.

4. As many times decided this court sits to redress wrongs and not to settle moot questions; and whenever it is made to appear that by time or other cause the matter in controversy has been extinguished pending the appeal; the appeal will be dismissed.

5. The facts which are proper to be considered on a motion to dismiss a pending appeal may be shown by reference to the prior or subsequent proceedings in the cause, or by affidavit, or other legal and competent evidence.

6. A special receiver is simply an officer of the court and as such has no right even in the cause in which he is appointed, without leave of the court, to intermeddle in questions affecting the rights of the parties.

7. The special receiver of a federal court, though authorized by that court, will not be entertained or heard in this court upon an appeal by him from a decree pronounced by a circuit court of this State in a cause pending there, to which he was not a party and whose personal rights are in no way involved or affected by the decree appealed from

McDADE v. NORFOLK AND WESTERN RAILWAY COMPANY.

McDowell County. Affirmed.

Robinson, President.

SYLLABUS.

1. The relation of carrier and passenger does not terminate merely by the act of the passenger in alighting from the car at his destination. It continues until a reasonable time for the passenger to leave the railway premises has elapsed.

2. Provocation by insulting words alone does not justify an assault upon a passenger by the conductor.

3. Exemplary damages are allowable in an action against a railway company for wilful injury inflicted by the conductor upon a passenger without lawful justification.

STATE ex rel. TULLY v. TAYLOR.

Braxton County. Reversed, Verdict set aside, and remanded.

Robinson, President.

SYLLABUS.

When counsel fees and personal expenses are sought to be recovered as damages on an injunction bond, it is incumbent on the plaintiff to show either that injunction was the sole relief to which the suit pertains, or that the fees and expenses were paid out solely for the purpose of procuring a dissolution of the injunction as distinguished from expenditures for the hearing of the principal issues involved in the case.

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The Bar

VOL. XVIII ~~XXII~~

OCTOBER, 1910

No. 10

THE BAR

Official Journal of the
WEST VIRGINIA BAR ASSOCIA
TION

Under the Editorial Charge of the
Executive Council.

Published Monthly from October
to May. Bi-Monthly from June
to September.

Entered as second class matter
August 11, 1904, Postoffice, Mor-
gantown, W. Va., under the Act
of Congress, March 3rd, 1879.

Price, per copy.....\$.10
Yearly, in advance..... 1.00

Advertising Rates on Request.

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We have now had a number of plans and suggestions for improving the practice of taking depositions in chancery. But the subject is not exhausted, and we would like to hear from any member of the bar who has anything to contribute to the subject.

We publish on another page of this issue a very readable, well expressed, sound and sensible paper by Hon. B. L. Butcher of the Marion county bar, read before the local Bar Association of that county. It deals with a topic that concerns the profession very intimately and is worthy of a perusal by its members. We are glad to give it a place in THE BAR.

The proposition was early before the West Virginia Bar Association to adopt the code of Ethics promulgated by the American Bar Association, on the assumption that it was the best proposed and that it would add to its force and effect for all State Associations to have a uniform code. Action on it was deferred and West Virginia will be late in accepting it. It has already been adopted by the following States:

New York, Pennsylvania, Illinois, New Jersey, Maine, Iowa, Florida, Tennessee, South Dakota, Kansas, Indiana, North Dakota, Ohio, Washington, Nebraska, Louisiana, Vermont and Connecticut.

Judge Goff, of New York, has held that the interference of Union labor to prevent a man running his business on the "open shop" plan, is an unlawful conspiracy. Why not? The courts held in the celebrated "hatter case" that a boycott is an unlawful conspiracy. Wherein lies the difference? A man is in the hat business and employs non-union labor, and all members of the Union conspire to destroy his patronage. Another man is manufacturing glass and there is a strike. The strikers conspire to prevent strike-breakers from taking their places. In either case it is a conspiracy to destroy a private business unless the owner accedes to the demands of the conspirators.

A few years ago a colonel of the Civil War, who is now a Justice of the Supreme Court of the United States, delivered a Memorial Day address on the "Soldier's Faith," in which he suggested that it is perhaps "not vain for us to tell the new generation what we learnt in our day and what we still believe—that the joy of life is living, is to put out all one's powers as far as they will go, and the measure of power is obstacles overcome; to ride boldly at what is in front of you, be it fence or enemy; to pray not for comfort but for combat; to keep the soldier's faith against the doubts of civil life, more besetting and harder to overcome than all the misgivings of the battlefield."

"For never land long lease of empire won

Whose sons sate silent when base deeds were done."

A young woman brought suit the other day, in a New York Court under an assumed name. The point was raised and established that it was not her real name. The Court said:

"The plaintiff, if she be known under more than one name, or has assumed a name other than her true name, may without the aid of judicial sanction sue under her assumed name. At common law a man could change his name 'without intervention of either the sovereign, the courts, or Parliament,' and the common law, unless changed by statute, of course obtains in the United States."

Judge Smith then referred to a Court of Appeals decision in which Judge Vann wrote:

"A man may legally name himself or acquire a name by reputation, general usage, and habit."

A prisoner at the sessions had been duly convicted of theft, when it was seen, on "proving previous convictions," that he had actually been in prison at the time the theft was committed. "Why didn't you say so?" asked the judge of the prisoner angrily.

"Your Lordship, I was afraid of prejudicing the jury against me."—*Home Herald*.

A SIDE LIGHT ON THE COST OF LIVING.

Mr. Martin, who is a farmer and also a member of congress from South Dakota, gives some very frank and suggestive facts as to who is paying the freight in these times of costly living.

He puts the case in a way that is original and illuminating:

For example a bushel of corn bought seven pounds of sugar in 1897. Now it buys sixteen pounds. The same bushel of corn bought five gallons of oil in 1897 and now it buys eleven gallons. In 1897 a bushel of corn bought 2.59 units of transportation. Now it buys more than 7 units. The table also showed that the purchasing value of oats, rye, barley and other cereal grains has increased proportionately in purchasing value.

Livestock also showed a marked increase in purchasing value. In 1897 a steer bought 370 pounds of sugar. Now, it buys 408 pounds. In 1897 the average American hog bought ninety-one pounds of sugar, whereas now it buys 192 pounds. Nowadays a hog buys 116 pounds of coffee, whereas in 1897 it bought only 42 pounds. The purchasing value of horses has also increased greatly.

"The farmer is not kicking," said Mr. Martin. "He is not selfish, but at the same time he would view with alarm the passing of the era of high prices."

AERIAL JURISPRUDENCE.

Curious things happen in Iowa sometimes. The courts of that State are called upon frequently to determine unusual cases. A meteoric stone fell from the sky on Iowa, becoming embedded in the rich farming land of a Hawkeye agriculturist. A wayfarer from Missouri dug it up and, claiming title as the finder, walked away with the aerolite. He was overtaken by the Iowa farmer, who claimed the stone as a part of his land. Who was right? The wisdom of a court was appealed to for a decision.

On behalf of the Missouri wayfarer, testimony was given by

an alleged Klickitat Indian, 70 years of age, the last of all his tribal family. The alleged Klickitat testified that when he was a young boy he used to go hunting with WACHINO, an alleged Clackamas chief; that he often saw this meteorite; that he had been told it was of iron: that it had hollows in it; that when it rained the water fell in it, and the Indians went there and washed their faces in the water and put their bows and arrows in it, which they used in time of war; that the medicine men said it came from the moon, and that the Indians called it "Tomanowos." If the Indians carried it about and their medicine men used it, it was portable and not real estate, and the finder, not the owner of the land, was entitled to possess it.

But one argument is good often until another is heard. Against this the prosaic claim was urged that whatever becomes a part of the land, become the possession of the land owner; that the finder was a trespasser and had no title to the stone, and that the traditions of the medicine men when the Iowas and Algonquins overran the State had no bearing on the question.

The Court therefore decided in favor of the Iowa man on legal, not sentimental grounds. He owned the aerolite. Indians worshipped mountains and streams as well as the sun and stars "without any right to them," and with an aerolite it was precisely the same.

The burly prisoner stood unabashed before the judge. It was his first time in a court and before a jury, says a writer in the Argonaut. "Prisoner at the bar," asked the clerk, "do you wish to challenge any of the jury?"

The prisoner looked them over with a skilled eye.

"Well," he replied, "I'm not exactly wot you calls in training, but I guess I could stand a round or two with that fat old geezer in the corner."—*Youth's Companion*.

The Saturday Liberal News, of Watertown, N. J., has a libel suit on its hands for publishing a picture of a barroom in which a double murder was recently committed. The picture was that of another place.

AN ECHO OF THE PURE FOOD LAW.

The act commonly known as the pure food law, approved June 30, 1906, was entitled "An act for preventing the manufacture, sale or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines and liquors and for regulating the traffic therein." A question at once arose regarding the results of the use of certain chemicals as preserving agents. One of the substances commonly used for that purpose is benzoate of soda. The law provided that examinations of specimens of foods and drugs should be made by the bureau of chemistry of the Department of Agriculture, and the machinery of that bureau was employed in a series of practical studies of the effects of benzoate of soda on the human system.

As a result of the experiments the bureau very decidedly put benzoate of soda in the deleterious class. Immediately there came a roar of protest from canners and picklers, who declared that their business would be ruined. It was asserted that many millions of dollars were at stake, that the canning industry and the pickling industry would be destroyed, that the farmers would lose an important and valuable market for their products, and that consumers would be deprived of many of their table supplies.

The then President, instead of standing loyally by this legally constituted official bureau, which many thought his only proper course, caused the appointment of the special commission that came to be known as the Remsen board. After a series of more or less elaborate tests, this referee board submitted a report expressing a view contrary to that of the official bureau. The official chemists were overridden by a departmental order, with the approval of the President, and on the basis of the finding of the referee board the use of benzoate of soda was officially recognized and permitted. The question has now reappeared, this time in the Federal courts.

Some six years ago the State of Indiana placed on its statute books a law prohibiting the manufacture and sale of articles of food in which "deleterious preservatives" are used,

and constituting the State Board of Health the authority in the determination of what is and what is not "deleterious." By the decision of that body benzoate of soda went into the prohibited group and the doors were closed to the sale of foodstuffs in which it is used as a preserving agent. This interfered with the sale of merchandise manufactured in other States and sold to dealers in Indiana. Producers of canned goods and pickles in Rochester, N. Y., and Detroit, Mich., brought suit against the State of Indiana and some of its officials, asking through a Federal court an injunction restraining the State authorities from preventing the sale of their merchandise in Indiana. Of the right of that State to prohibit the sale of a deleterious substance there can no more question than there is of its right to prohibit the sale of intoxicating liquors. The question is whether benzoate of soda is properly classed as a deleterious substance. If it is not properly so classed, the sale of foodstuffs in which it is used is not prohibited by State law, and the canners and picklers of Indiana and other States may use it in merchandise for sale to the Indianians as freely as they might use salt on meats or sugar in preserves.

As a part of the legal proceedings the Attorney-General of Indiana is now in Washington taking testimony for presentation in the trial in the Federal court in Indiana. He has made complaint of unfair treatment by the Department of Agriculture, asserting that in obtaining the testimony of the referee board that decided in favor of the use of benzoate of soda he had the approval and the co-operation of the Department, while he has encountered obstacles in the Department in his efforts to secure the testimony of Dr. Wiley and his assistants, who were and still are strongly opposed to the use of that chemical as a preserving agent. His charge of official partiality appears to be fairly supported, but he is getting what he wanted, and it may be supposed that the experts of the official bureau are not averse to giving support to the position taken earlier by them.

If the decision of the Federal Court in Indiana supports

the opinion of the Remsen board the result will doubtless be the issuance of a Federal injunction over-riding a State law and the interpretation of that law by the State officials. Presumably, the State would carry its case to the higher courts. If the decision shall be in accordance with the experience and view of the experts of the bureau of chemistry of the Department of Agriculture the accepted opinion of the Remsen board would be so discredited as to make its rejection almost a necessity.

STANDING ON THE FOUNDATIONS

When Mayor Gaynor of New York, was criticized for not debarring the "fight pictures" from exhibiting in that city, although he was in sympathy with those who would exclude them, his simple and complete reply was, that although he was Mayor he had no more authority than any private citizen beyond that which the law conferred upon him.

"Ours is a government of laws and not of men," said he.

"I am not the Czar of New York and I can only enforce the laws as they exist"

"You may be absolutely certain that I will not take the law into my own hands.

"The growing exercise of arbitrary power in this country by those put in office would be far more dangerous and is far more dreaded than certain other vices that we wish to minimize or be rid of."

These are golden words fitly spoken at a time when we would fain send them ringing through the length and breadth of the land. A New York paper well said that "of all the admirable things Mayor Gaynor has done, none was more admirable than his rugged insistence that arbitrary power has no place in a Republic and that personal government must not be substituted for a government of laws, however great the immediate advantages may seem."

It is reassuring at this time to have a man in the executive office administering the government of the great city of

New York, and a man in the executive office at Washington administering the government of this great nation who are both thoroughly trained lawyers, schooled by long experience on the Bench not only to know the law but to absorb its spirit and respect its dignity and the importance of maintaining its supremacy over arbitrary encroachments of official power.

We do not say that all officers in a republic should be lawyers. But we do say that no man should be elected to office who has not the judicial spirit and the attitude of the trained lawyer toward the law.

THE BOTTOM FACTS

We have several times given expression in these pages, that any substantial reform in our judicial procedure must begin with the reformation of the lawyers.

In other words, the lawyers have it within their power to make all the reforms that are now so loudly demanded, without any aid from legislation or any other source.

We have before us, at this writing, a private letter from one of the most able judges of this State, which we would like to publish in full, if it were permissible. But the letter is not written for publication, and when he wrote it he did not suspect that any part of it would ever appear in print. Yet without violating any confidence as to the author, we venture here to quote a few sentences which every practical lawyer will recognize as bottom facts. Says he:

"But frankly, between you and me, the bar all over the state is most largely to blame for delays in trials. I'll tell you one may say all he pleases about the 'high profession,' and the honorable and responsible relation the lawyer sustains to organized society; but you would have to sit on the Bench and watch the shystering movements of what is termed 'high grade' lawyers only a short time, to realize how few of the legal fraternity keep before them a view of their duties to the public in the practice of the law, and how few of them remem-

ber that they are Court officers sworn to assist in the administration of the law rather than impede its administration. They forget that it is their sworn duty to assist the court in arriving at correct judgments and in administering justice, rather than dilatory tactics to delay the courts and befog the issues and try to entrap the court for the purpose of appeal and further delay. What the public needs is not necessarily so much change in the rules of Court practice as it is a change in the attitude of the lawyers of the State toward the Courts and a cleaner realization of their duties to the public growing out of the privileged character of their profession."

"This sounds a little harsh and like I was sore on the profession; yet I am not sore, nor have I any exceptional occasion to be sore: but there is truth in it as sure as you live. No judge in the State, I am sure, has practicing before him lawyers against whom, as a whole, less can be said than I have; and yet I have grounds for complaint."

We believe there is no judge in the State, and perhaps no practicing lawyer, that will take issue with the above indictment, made by an able Judge, in an impartial spirit, without enmity and with no possible desire or intent to unjustly reflect upon the Profession.

President Taft, an experienced lawyer and judge, has given his testimony along the same line. "As a lawyer," he said recently he felt called upon, to remark that the administration of justice in this country "has suffered grievously from the intensity with which lawyers have served their clients and the lightness of the obligation which they have felt to the court and to the public as officers of the court and the law to do no injustice." The lack of scruple as to means, he said, which counsel too frequently exhibit in defense of preservation of their clients' interests is often the cause for popular resentment.

"The conduct of the defence of criminals in this country," continued the President, "and the extremes to which counsel deem themselves justified in saving their clients from the just judgment of the law, have much to do with the disgraceful

condition in which we find its administration. The awakened moral conscience of the country can find no better object for its influence than in making lawyers to understand that their obligation to their clients is only to see that their clients' legal rights are protected, and they need not and ought not to lose their own identity as officers of the law in the cause of their clients and recklessly resort to every expedient to win the cause."

These criticisms furnish food for reflection. Is it not time that the whole conception of the lawyer's profession should be reconstructed? Under the modern idea of his mission in a trial, to deny everything and admit nothing, we have drifted into a contentious procedure that does not aim (so far as the bar is concerned) to do justice, but to defeat justice. Until two lawyers, representing opposite sides of the case, can learn to sit down together at the trial table each with a conscientious and single motive to arrive at truth and justice between parties and to do so with the utmost directness and frankness, the usefulness of the lawyer will continue to diminish in the eye of the public, and the now popular demand for a reorganization of our courts will result in relegating the lawyer to the rear.

ANOTHER ENTERPRISING LAWYER.—A Texas lawyer adds the following to his professional card:

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THE NEW NATIONALISM

The platform of "New Nationalism" recently promulgated by ex-President Roosevelt is not new.

A very able and influential journal, "The Outlook," of which Mr. Roosevelt is the contributing editor, has been ably and forcibly advocating the tenets of the platform for some years; while Mr. Roosevelt has been putting them into practical effect as President of the United States.

There are two planks in the platform as formulated by Mr. Roosevelt which contain the pith and spirit of the whole movement: and contain, as well, the danger to American institutions, although concealed in language that make them very inoffensive to the casual reader, but disclose the dynamite to the lawyer who looks below the surface. They read as follows:

"The New Nationalism is still more impatient of the impotence which springs from the over division of Government powers."

"This new nationalism regards the executive power as the steward of the public welfare."

When the full meaning of these two planks is understood, they will seem to contain an avowal of a doctrine more revolutionary than anything that ever proceeded from the lips of any American who has held high office in our Government.

Without going into any extended discussion, the doctrine of the New Nationalism may be explained, in short, to hold that there is a sovereign or inherent power in the President, to assume any functions not expressly prohibited by the Constitution; and this doctrine applies to other departments of the Government. *The Outlook* expresses it by saying that The President is a "King," having all the prerogatives of a King at the head of a Government, so far as he is not restrained by the terms of the Constitution. It illustrates the New Nationalism by remarking the difference between Mr. Taft's administration and that of Mr. Roosevelt; If any course of action was proposed Mr. Taft would inquire: "Is there any law for it?" Mr. Roosevelt would inquire, "is there any law against it?"

Mr. Roosevelt, as another illustration, inveighs against the Supreme Court, because it decided that a law of New York was unconstitutional and void which was unquestionably of great benefit to a certain class of citizens; holding that the Court ought to have shut its eye as to the law in order that the citizens concerned should enjoy the benefit proposed! We are not using his language but we are stating the theory that is held when he says that "This new nationalism regards the executive power as the steward of the public welfare! He has no limitations unless they are expressly incorporated in the Constitution.

Now we want to see what the Supreme Court of the United States has to say of the New Nationalism, and we invite a careful reading of it, because it will be reassuring to every lover of this Republic, and every patriot who is beginning to fear for the old nationalism.

In a very recent case—we have not the reference at hand—but it is the case of *Kansas vs. Colorado*, in which the court had occasion to deal with this subject, the opinion said:

"The proposition that the legislative powers affecting the nation as a whole which belong to the national Government, although not expressed in the grant of powers, is directly in conflict with the doctrine that this is a Government of enumerated powers. That this is such a Government clearly appears from the Constitution, independently of the amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the Constitution is made absolutely certain by the Tenth Amendment.

"This amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the national Government might, under the pressure of supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, *and that if in the future further powers seemed necessary they should be granted by the people in the manner they had provided for amending that act.*

"It (the Tenth Amendment) reads: 'The powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively or to the people.'

"The argument of counsel ignored the principal factor of this article, to wit, 'the people.' Its principal power was not the distribution of power between the United States and the States, but a reservation to the people of all powers not granted. The preamble of the Constitution declares who framed it, 'We the people of the United States,' not the people of one State, but the people of all the States and Article X. reserves to the people of all the States the powers not delegated to the United States.

"The powers affecting the internal affairs of the States not granted to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively, and all powers of a national character which are not delegated to the national Government by the Constitution are reserved to the people of the United States.

"The people who adopted the Constitution knew that in the nature of things they could not foresee all the questions which might arise in the future, all the circumstances which might call for the exercise of further powers than those granted to the United States, and after making provision for an amendment to the Constitution by which any needed additional powers would be granted they reserved to themselves all the powers not so delegated."

A BORN JOURNALIST

Judge Alvin Duval (while judge of the Kentucky Court of Appeals) in company with 'Squire Johnson, a very large man—the judge being much smaller—once called a political meeting in Lexington, while for the lack of adequate advertisement was attended by themselves only. The distinguished judge, possessing a fund of quiet humor, finally began to write a notice, reading aloud as he wrote: "At a large and respectable meeting held in this city yesterday—"

"Stop there a minute judge!" exclaimed the squire in surprise, "you surely wouldn't publish a notice that this was a large and respectable meeting."

"Why not?" quietly rejoined the judge. "Are you not large and am I not respectable?"—*Circle.*

THE SUPREME COURT AMENDMENT

The proposed constitutional amendment for increasing the number of judges of our Supreme Court, is simply, and we might say, solely, a measure for expediting the business of that Court.

It is not worth while for THE BAR to explain its provisions, for every lawyer is presumed to be familiar with them; and we could not reach the laymen if we would, and could not induce them to listen if we did. They will vote blindly, or at least indifferently, while it will be the chief matter of interest to the lawyer.

Any measure that tends to expedite the business of the courts is pertinent and fashionable now, and even if it is not the best measure that could be devised will be accepted on general principles, as the least of two evils.

There is probably, only one practical way for expediting the business of the Supreme Court of Appeals, and that is to increase the number of judges who are to do the work. As compared with other courts there is very little time consumed in this by open court proceedings. Its work is done in the quiet of the council chamber.

The proposition is to divide the Court into two parts consisting of three judges each, each part working independently of the other, and thus dispatching twice the business of a single court. The practical operation of the amendment will be to make the decision of any one part the judgment of the court, the other judges giving only a nominal concurrence. The Chief Justice is intended apparently as a fifth wheel, as he simply divides the judges into their respective parts, assigns the cases, and need not preside over either of the two parts—and it is quite evident that he could not preside in both.

As a measure for the dispatch of the business of the Court we would guess that it will prove a success. And so far as we know there is no opposition to it in the Profession. The

last meeting of the Bar Association took steps to promote its adoption.

We would be glad to have members of the Profession use the columns of *THE BAR* for its discussion.

A PRACTICAL AND SAFE PLAN FOR REFORMING OUR COURTS.

In the last number of *THE BAR* we published an article under the above title which we here reproduce as the shortest method of bringing it again to the attention of our readers:

"We believe that the most effective and comprehensive answer to the public demand for reforming our Courts, can be accomplished—not by legislative enactment, and spasmodic amendments of the law—but by "Rules of Practice," regulating the procedure in our courts.

We believe also that these rules ought to come—not from the Legislature—but from the bar itself, duly commissioned and authorized to formulate and adopt them. Nearly every defect complained of in the methods of our courts, can be corrected, and only corrected by a well digested and well enforced Code of rules, regulating the practice in our courts.

We have in mind a plan for bringing about this regulation of the practice which we hereby submit for discussion and criticism by the bar:

1. We would have all the judges of the Circuit Courts, together with one member of the Supreme Bench, constituted a commission by legislative act to make, adopt, formulate and put in practice a set or Code of rules of procedure governing and making uniform the practice in all the courts.

2. The Commission should meet once a year at such times and place as it would appoint, to revise, amend or repeal and perfect these rules, as experience might suggest. They should be printed and bound in convenient form at the expense of the State, and should be binding on all the courts in so far as not in conflict with any statute.

3. If the Commission should desire to make any rule or regulation, that is in conflict with an existing statute, they should recommend to the Legislature an amendment or repeal of the statute, and the Legislature could reserve the right to modify or abolish any rule adopted by the Commission.

We believe that this plan could be practically put into operation without any specific legislative act, if the Judges of the Courts could be brought to agree to carry it out; for they already possess general authority to regulate and control the practice in their courts. But they could go further and correct the practice in many respects where it is now regulated by statute, and there is no doubt but the main defects, the delays, the excessive costs and the circumlocution in our courts would be corrected if such a commission was invested with legislative authority such as we have suggested.

We make the above suggestion for the purpose of inviting the views and criticisms of the bar. If there is any virtue in it, why may not the Bar Association prevail with the powers-that-be to put it in operation?

And why may not West Virginia be the pioneer State toward a substantial and practical basis of reform in the courts?

We have invited the Judges of the State to discuss, criticize, approve or oppose, this proposition in the hope that it might be developed into a complete working plan for meeting the universal demand for improving the administration of the courts.

We are pleased to publish, on another page of this issue, the views of Judge H. C. Hervey of the first Judicial Circuit which we hope will be followed by many or all the members of the Judiciary.

The one difficulty which Judge Hervey seem to see in the practical operation of the plan, is that it would be hampered by existing legislation, so that the Judges would not have a free hand in curing the chief ills which he recognizes as now existing in our Court procedure.

The Judge misapprehends the full scope of our proposition.

We would not have the existing legislation to hamper the proposed Commission.

Let us present what has been in our mind as a scheme for inaugurating the new procedure.

We would have the State Bar Association appoint a committee of picked lawyers and judges to draft a bill to be pre-

sented to the Legislature for adoption; that bill providing for two things: 1. The repeal of the 125th chapter of the Code, and the substitution of an act—a practice act—which should deal only with the general features of procedure and prescribe the general lines to be followed, leaving details to be fixed by rules of Court which the courts might change from time to time as actual experience and their practical operation might dictate.

2. The appointment of a Commission constituted, as suggested above, of all the Circuit Judges, one member of the Supreme Bench (and we believe we would add, the Standing Committee on Judicial Administration, of the State Bar Association) which Commission should have plenary authority to enact, revise, repeal and regulate these rules, and make them the established code of procedure in all the courts.

We think such an act would remove the objection in Judge Hervey's mind, and put the reforming of the Courts up to the Judges, where it rightfully belongs.

Judge Hervey deals with the chief defect in our Chancery practice, and the mode of taking depositions, and makes a new suggestion which has much to recommend it, and which the doing things that now makes litigation costly and tedious, and as Judges can put into practice if they will—but is there the slightest probability that they will?

What we want is a recognized code of procedure that will bind the courts to do things; as well as restrain the bar from Judge Hervey says often enables them to defeat the ends of justice.

Are any of the Judges interested in reform?

If so, the pages of this journal will afford them an opportunity to help it along. We hope they will use it.

The attorney general of Wisconsin has handed down an opinion upholding the constitutionality of the 20 per cent primary election law. This provides that candidates of a political party shall poll 20 per cent of the vote cast at the previous general election to be eligible.

REFORMING THE COURTS.

Editor of Bar:

Responding to your request for my views upon the subject of a "Basis for Reform in the Courts," presented in the last issue of THE BAR, I am compelled to say that I can not agree with the statement: "Nearly every defect complained of in the methods of our courts can be corrected, and only corrected, by a well digested and well enforced code of rules, regulating the practice in our courts." The reform in our legal procedure which is demanded must be one which will bring about greater changes than any which can be secured by the adoption of a uniform code of court rules; it must result in important modifications of the law of procedure in both pleading and practice. Procedure is not dependent upon and can not be regulated by rules: And the serious difficulties which beset the way of a litigant who comes into court with a just and legal claim to relieve, difficulties which often bring about a denial of justice, can not be avoided by any system of rules which the courts are now empowered to adopt. Our procedure is part of our law and can be changed only by legislation.

I may, however, misapprehend the scope of the act which is suggested. If it is part of the plan suggested by THE BAR to confer upon the proposed commission power to make and adopt rules which may supersede the law of practice and procedure, except so far as that law is fixed by constitutional or statutory regulations, then I agree that the plan opens up an opportunity for reform that may mean much for the advancement of improved methods in the conduct of our courts. Such a statute would be along the line of the English Practice Act, and would mean a most pronounced departure from our present system. But I do not think THE BAR intended to suggest such legislation.

Those of us who are constantly engaged in the work of the courts are seriously impressed with the lack of efficiency in our legal machinery. The responsibility for this inefficiency can not be laid at the door of any particular class; but it is due

to a system inherited from the long ago and from which it is difficult to escape. It is a system in which the end to be attained is considered of less importance than the means through which that end is to be accomplished; a system in which the preservation of a faultless machine is the test of efficiency, and in the effort to secure that faultlessness the product is lost to sight. Our courts are not administering justice and entering judgment according to the law of the land and the right of the case. They are making blundering efforts to do this, but these efforts often fail solely because of the technical difficulties which beset legal trials. We ought to be able to say of our court procedure what an English law writer has said of that in his country, that: "No honest litigant of ordinary sagacity can now be defeated in an action by any new technicality or lose his case through any mistaken step or accidental slip." That we can not honestly say this, is proof enough of our need of a thorough reformation. As it now is one may come into our courts with a good case and adequate proof to sustain it and yet fail to secure the relief which the law provides; and this because of some technical flaw, which has no bearing on the merits of the case, but is due to the skill of opposing counsel, or some oversight of plaintiffs' lawyer or the blunder of the trial judge, or perhaps to some slight omission, which, at the time passed unnoticed, but is afterward resurrected to destroy the effect of a just verdict.

Allow me to say here a few words upon another subject, closely related to the one under discussion, which has received some attention from THE BAR. I refer to the taking of evidence in chancery causes. There seems to me to be an easy and practical method of paving the way for improvement in this matter of chancery practice. This may be brought about by a statute which will provide that the court, upon the motion of any party to the cause, or upon its own motion, may set any chancery cause for hearing in open court; and that the evidence in such case shall be taken as in law cases by the court stenographer. The evidence should not be transcribed unless in difficult cases it is required for the use of the court or to make

up a record for appeal. Such a statute would leave the matter of hearing the evidence in open court within the control and discretion of the judge and would not compel him to hear the cases in that way when he could not find time to do it. But I am persuaded that so much useless and irrelevant matter, which now goes into chancery records, might be excluded by hearings in open court that the time saved from that now required to go over and examine this useless evidence would go far toward providing the time necessary for court hearings.

In causes that are referred to a commissioner for report the evidence would be taken before him. The method here suggested would result not only in expediting chancery causes but would reduce the expense of that which, under our present practice, is a costly form of litigation.

There are circuit judges who are willing to aid in the bringing about of this reform and if by trial in some of our courts it could be found satisfactory it would soon find its way into other circuits.

THE END WAS MISSING

An Irishman on board a man-of-war was ordered to haul in a tow line. After pulling in forty of fifty fathoms, he muttered to himself:

"Surely its as long as today and tomorrow. Its a good week's work for any five men in the ship. Bad luck to the leg or the arm it'll at last. What more of it yet? Ouch murder! The say's mighty deep, to be sure!" After continuing in a similar strain he suddenly stopped short, and, addressing the officer, exclaimed: "Bad mannars to me, sir, if I don't think somebody's cut off the other end of it! It's missing."

TIT FOR TAT.

An Irishman was sitting in a depot smoking when a woman came and, sitting down beside him, remarked:

"Sir if you were a gentleman you would not smoke here."

"Mum," he said, "if ye wuz a lady ye'd sit farther away."

"If you were my husband I'd give you poison."

"Well mum," returned the Irishman, as he puffed away at his pipe, "if you wuz me wife I'd take it."—Kansas City Independent.

No SUCH WORD.—At a hearing before an Irish dispenser of justice in Pennsylvania the 'Squire stopped the proceedings and began writing industriously.

"What are you doing 'Squire?" asked the attorney for the prisoner.

"I'm committing the man to jail," answered the 'Squire.

But you can't do that," asserted the astonished attorney.

"I can't, can't I? and me a-doin' it," was the calm reply.
—*Lippincott's*

On a recent jury day in the First District Court a stolid-looking German presented to Justice Joseph a certificate from the Commissioner of Jurors. After a rapid glance at the document the Justice ordered the man to raise his right hand and administered the oath.

"Your name is Herman Kaufman?"

"Yes, your Honor."

"This paper," continued the court, "requests me to excuse Herman Kaufman from jury duty on the ground that he is dead. Now, remember that you have sworn to tell the truth and think well before you answer: Are you dead?"

"No-o, your Honor," was the bewildered reply. "I don't think I am."

"You think that you are alive?"

"Y-e-s, your Honor."

"That will do. Now take this paper back to the Commissioner of Jurors."

The man did so. When the Commissioner examined the certificate it bore the following indorsement in the Justice's handwriting: "The deceased appearing before me in open court, insists under oath, that he is not dead. Please investigate and if his testimony be false, have him indicted for perjury."—*New York Times*.

The late Chief Justice Chase was noted for his gallantry. While on a visit to the South shortly after the war, he was introduced to a very beautiful woman, who prided herself upon her devotion to the "lost cause." Anxious that the chief justice should know her sentiments, she remarked, as she gave him her hand. "Mr. Chase, you see before you a rebel who has not been reconstructed."

"Madam," he replied, with a profound bow, "reconstruction in your case would be blasphemous."—*Everybody's Magazine*.
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LORD MACAULAY'S PROPHECY

In a letter written on May 23, 1857, in which he pointed out at length the dangers of our liberties that would result from social unrest, Macaulay said:

"The day will come when the state of New York a multitude of people, none of whom have had half a dinner, will choose a legislature. Is it possible to doubt what kind of legislature will be chosen? On one side is a statesman preaching patience, respect for vested rights, strict observance of public faith. On the other, is a demagogue ranting about the tyranny of capitalists and usurpers, and asking why anybody should be permitted to drink champagne, and to ride in a carriage, when thousands of honest folks are in want of necessities. Which of the two candidates is likely to be preferred by the working man who hears his children cry for more bread?

Either some Cæsar or Napoleon will seize the reins of government with a strong hand, or your republic will be in the twentieth century, as the Roman was in the fifth; with the difference, that the Huns and Vandals, who ravaged the Roman empire, came from without, and that your Huns and Vandals will have been engendered within your own country and by your own institutions."

DIVORCE REFORM IN ENGLAND

The subject of divorce reform has of late been attracting much discussion in England, and a royal Commission on the Law of Divorce has been hearing opinions upon proposed changes in the law. The following editorial paragraph from *The Law Journal* (London) of March 5, 1910, is of considerable interest:

"Upon the desirability of altering the substantive law of divorce there seems more unanimity among the witnesses who have so far appeared before the commission. All have been agreed that there should be a right to release from the marriage tie where one of the spouses is condemned to a long sentence of penal servitude, or is found to be a lunatic. There is a difference of opinion as to the period which should be required before the court should give a release in these cases, and again as to whether the right of relief should be absolute or discretionary; but a change in the law in this direction is recommended by the judges as well as by other witnesses.

THE IDEAL JUDGE.

From the first "title" of *The Visigothic Code*, we take this quaint characterization of the ideal judge.

He should be energetic and clear of speech; certain in opinion; ready in weighing evidence; so that whatever proceeds from the source of the law may at once impress all hearers that it is characterized by neither doubt nor perplexity.

The Judge should be quick of perception; firm of purpose; clear in judgment; lenient in the infliction of penalties; assiduous in the practice of mercy; expeditious in the vindication of the innocent; clement in his treatment of criminals; careful of the rights of the stranger: gentle toward his countrymen. He should be no respecter of persons, and should avoid all appearance of partiality.

All public matters he should approach with patriotism and reverence; those concerning private individuals and domestic controversies he should determine according to his authority and power; so that the community may look up to him as a father, and the lower orders of the people may regard him as a master and a lord.

He should be assiduous in the performance of his duties so that he may be feared by the commonalty to such a degree that none shall hesitate to obey him; and so just that all would willingly sacrifice their lives in his service; from their attachment to his person and to his office.

Then, also, he should bear in mind that the glory and the majesty of the people consist in the proper interpretation of the laws, and in the manner of their administration. For, as the entire safety of the public depends upon the preservation of the law, he should attempt to amend the statutes of the country rather than the manners of the populace; and remember that there are some who, in controversies, apply the laws according to their will, and in pursuance of private advantage, to such an extent that what should be law to the public is to them private dishonor; so that, by perversion of the law, acts which are illegal are often perpetrated.

A tragic climax topped off a series of raids in Devils Lake when Dan Brennan, publisher of the Devils Lake (N. D.) *Inter Ocean* and a leader in the citizens' movement for a clean city, was murderously assaulted while leaving his office.

"ON THE FIRING LINE."

A Paper Read Before the Marion County Bar Association by
Hon. B. L. Butcher.

Lawyers as a class are more distinctly "on the firing line," or line defining right and wrong, than any other profession or calling. He may be said to live near, and get his living from, the "twilight zone." Most of us have long since learned, the almost universal experience, expressed in the common saying—"there are always two sides to a case," and, the lawyer who does not act upon the philosophy of this wise old saying, will have several unexpected bumps against the ceiling, before he reaches the retiring line!

This very saying indicates the point of my remarks—Lawyers, (two or more, of course) who are called upon to settle or try a case, "with two sides" are sometimes tempted, and always have the opportunity, to attempt to strengthen the chances of winning, by dodging into the woods of the "twilight zone;" and, justify it, by citing a similar 'excursion,' (as he thinks) by his opponent.

Many of us have the idea that these little "suppressions of the truth" and delicate "coloring of the story," with the shade of aniline—(Ananias—) dye, that will be most attractive to the jury, are legitimate; and, part of our stock in trade. In fact, many clients consult an attorney mainly to ask him to suggest, if possible, some way to escape just responsibility; or, to overreach his opponent, in a suit or threatened suit; and, here is where that other old saying got its vogue and vitality, known as "whipping the devil around the stump."

I quote Rule No. 10 of the Code of Ethics of the West Virginia Bar association here, as pertinent:

"Nothing has been more potential in creating and pandering to popular prejudice against lawyers, as a class, and withholding from the profession the full measure of public esteem and confidence which belong to the proper discharge of its duties, than the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is an attorney's duty to do everything to succeed in his client's cause."

"An attorney 'owes entire devotion to the interest of his client, warm zeal in the maintenance and defense of his cause, and the exertion of the utmost skill and ability,' to the end that

nothing may be taken or withheld from him save by the rules of law legally applied. No sacrifice or peril, even to loss of life itself, can absolve from the fearless discharge of his duty. Nevertheless, it is steadfastly to be borne in mind, that the great trust is to be performed *within*, and not *without*, the bounds of the law which creates it. The attorney's office does not destroy man's accountability to his Creator, or lessen the duty of obedience to law, and the obligation to his neighbor; and it does not permit, much less *demand, violation* of law, or any manner of fraud or chicanery for the client's sake."

If clients and attorneys would give their time and energy trying to simplify the issue, hasten the result and cut out unnecessary costs, in the cases in court, instead of trying to inject something that will confuse the issue, muddy the water, create doubt, stimulate suspicion, cast reflection upon the motives of witnesses, and add to the costs, and delay the result; there would be many more cases to be disposed of and the fees more satisfactory.

Many of the efforts to create trouble for the other fellow, come back as a "boomerang," and furnish a club for the fellow on the other side, to "beat" us, before the jury. And what is worse, much of it serves to embitter neighbors and business associates, stimulate gossip mongers, lower the dignity of the courts, and the standing of lawyers among the people; and, adds unnecessary costs of litigation.

If the active business man could be convinced that commercial differences could be quickly and cheaply disposed of, much more of his business would seek settlement through the courts; and, lawyers would be immensely benefited in fees and commissions paid by those able to pay for the service rendered, in guiding disputed transactions quickly, simply and cheaply, through the prescribed and safe channels of the courts of justice.

I am not saying this with any case, court or lawyer in mind but from observation covering about thirty-four years of somewhat limited, actual practice; nor, am I writing this to start a reform in Court procedure. On the contrary, I wish to follow up the "firing line" idea, into more attractive battle fields than the ordinary Cow or Horse case; Italian scrap; Syrian wrangle; family litigation; and, the like!

The vast amount of capital and the great number of persons now engaged in the enormous business operated by and through corporations and especially public service corporations,

and their important, (often partner) customers, has been testing out our Courts and lawyers as they have not been tested since the days when Lord Bacon fell victim to the insidious "fee for favor at Court," or Boss Tweed, was brought to bay by that eminent lawyer, and great citizen, Samuel J. Tilden and his associates.

The corporation has "no *soul*," and its owners and managers feel no compunction of conscience, therefore, in exposing it to "hell fire" in using it to "rake out the chestnuts." But in all cases these same owners and managers seek the advice of attorneys; and, usually the very best talent in the profession, is retained by them—so that whatever exposure to "fire" or "water," to which a corporation is subjected, it is usually after consulting its lawyers'; and, this "fire and water" business always relates to dealings with, what, for lack of a better expression we call, "the public."

It is well to explain here that the attitude toward this impersonal entity called "the public" in the minds of some, is not politely, but tersely expressed, in the remark, attributed to the late William H. Vanderbilt, "the public be damned."

This sense of contempt for a supposedly big awkward, timid, uncultured, unsophisticated, country "bumpkin," called "the public" has grown, largely, out of the feeling of security, based upon the belief, that the lawyers would find a way to protect their clients from actual punishment when the "big fellow gets on his ear," and begins to elect farmers and other good people to the Legislature, and to congress and other jobs, to pass laws to protect "the public" and punish grafters and other thieves and robbers; and, this sense of security has often been justified by the results. The lawyers have usually found the Legislation, seeking to remedy these complaints, ill considered, crudely drawn; and, the appeal to the Courts is, therefore, usually successful, in side-tracking, the alleged reform. "*Blind justice*," not seeing the wrong is unable to distinguish the *real point*, from the clamour (for revenge by a long suffering public) and finds the new statutes "out of tune" with the principles of the Common Law.

The Common Law, originated in the customs of the tribes of sea-rovers, hunters and fishermen on the coasts around the North Sea, modified by injections from the Roman Civil Law; and the adoption of the Feudal System of the Normans, fused and applied for some hundreds of years by the Courts of the

"tight little Isle;" and, blanketed over our institutions, State and National from the days of our swaddling clothes; so our Courts sometimes find the new laws in direct conflict with these "ancient lights;" and, conclude the new effort is unconstitutional. And, it is even so.

It is not strange that the laws so passed by farmer legislators would be crude and lack the usual Constitutional and other requisite safeguards. It is not strange that the Courts would so decide, if they found them defective. But it is dawning on the minds of some, that these "custom made laws" whereof the "memory of man runneth not to the contrary" may be based upon one or more false premises, in the light of this "electrical age." For example: The one recently examined by our own Court, when the ancient doctrine that "the owner of property may enjoy it, in such manner as not to injure, that of another" although, apparently the application of the Golden Rule, to the use of property, does not apply, to those who own property in layers or strata: a streak of lean and a streak of fat, unless it is "nominated in the bond."

See Griffin Vs. Coal Co. 59 W. VA. page 480

Yet without calling in question the correctness of the reasoning in particular cases the thing that does seem somewhat strange to the unsophisticated "public," is, that when the courts finally get into action, the corporation nearly always wins, even if the court finds it necessary to overthrow some of these same Common Law doctrines.

It is like the experience of the late Judge Dent with election cases, in our Supreme Court of Appeals, related in one of his opinions while a member of the Court: The Court had been interpreting the election laws as applied to our "bastard" Australian ballot; and, in nearly all cases Judge Dent found it necessary to dissent from the conclusions reached by the other members of the Court; but finally a case came before them, in which Judge Dent reached the same conclusion as the majority: and, was right; but, he said this decision, 'also' elected a *Republican*; as, had each of the previous decisions; from which he had dissented.

His duty on the firing line requires the lawyer to respond to the demands of his client, for help when in trouble, and to see that he has a fair trial, and that no unreasonable burdens or punishments are inflicted. In his zeal to serve his client lies the danger. Frequently the right and the wrong of the proposition is so covered and concealed that it is not easy to find the

line of demarkation. I quote again from the State Bar Association Code of Ethics, a quotation therein, from the late Chief Justice Sharswood, of the Pennsylvania Supreme Court of Appeals:

“There is perhaps no profession after that of the sacred ministry in which a high-toned morality is more imperatively necessary than that of the law. There is certainly, without any exception, no profession in which so many temptations beset the path to swerve from the lines of strict integrity, in which so many difficult questions of duty are constantly arising. There are pit falls and man-traps at every step, and the mere youth at the very outset of his career needs often the prudence of self-denial as well as the moral courage which belong commonly to riper years. High moral principle is his only safe guide, the only torch to light his way amidst darkness and obstruction”

“No rule will determine an attorney's duty in the varying phases of every case. What is right and proper must, in the absence of statutory rules and an authoritative code, be ascertained, in view of the peculiar facts, in the light of *conscience*, and the conduct of honorable and distinguished attorneys in similar cases, and by the analogy to the duties enjoined by the statute and rules of good neighborhood.”

Whatever the temptation and stress of the client, however, no lawyer can afford to tamper *for a moment*, with a suggestion of bribery or improper influence with courts or juries.

The late James Morrow, related an experience once, in my hearing that illustrates the lawyer's temptation as a public official: He was a member of the House of Delegates from this (Marion) County when there was some important legislation pending as to Insurance Companies. One evening while in his room at the hotel some one politely knocked at his door and was invited, and came in; and, introduced himself as representing the Insurance Companies: and much interested in the legislation then pending. They discussed the subject generally and the young man said he was a stranger, and the interests he had in charge were important and he felt that he ought to have a good lawyer to advise him and had been cited to Mr. Morrow; and was there to retain him at a liberal fee.

Mr. Morrow listened to the young man, as he proceeded rapidly and politely; and, apparently perfectly unconscious of any element in the transaction except the ordinary employment of an attorney; and when he had finished, Mr. Morrow said to him in his sarcastic and dignified manner, “young man, if I

thought you were conscious of the thing you have just proposed, I would kick you down the stairs and have you locked up as a felon." He said the young man was utterly surprised, at the turn, and apologized profusely; and said he was in the habit of employing members of the different legislative bodies when the service was in their professional or business line!

The lawyer should seek as before said, to protect his clients in their lawful rights and manfully stand for these rights, whether or not it is popular to do so, but, never to encourage a client to injure his opponent unnecessarily; but discourage all tendency to win by fraud or dishonest means; insisting that it is better to lose the case than to assist at a miscarriage of justice. An abortion of justice is not much better in its last analysis than treason; and, when conditions became so that such crimes are common anarchy and not law prevails—and a revolution is approaching—a black storm of revenge that will sweep away fortunes of those who succeed by corruption and bribery as well as many fortunes of the innocent and helpless and destroy many lives as well, in the sea of panic and ruin in its wake. The lawyer who contributes one case of this class, is to that extent helping to destroy the value of all property rights, and to degrade his own profession to the level of the pirate.

The lawyer who permits himself to advise his clients to "fight the weak," because they are weak; and, settle with the strong because they are strong; regardless of the merits of the cases in either instance, is "laying up wrath against the day of wrath." He may save a few dollars to the expense account of his client by forcing a few widows and poor men to abandon their claims for injuries to their little property, and the hurts to themselves and families, but, he is sowing dragon's teeth, that will spring up to rend his client, in the day of trouble.

Why should a great corporation transacting business in many States, with thousands of people and corporations, its customers or employes, all bringing it business and trade, and service; some little, some much, have a war of litigation with one of them over the settlement and adjustment of a loss or an injury to property or person, through accident or the negligence of some one?

Persistently followed, such a course will result in serious losses by reason of the resentments thus created in the minds of the litigant and his sympathizing friends; these develop in prejudice in the neighborhood; and, a number of these cases so

pervade the community that the prejudice permeates the public mind finds its way into the jury box and other official stations; and, at last imposes the maximum penalties and damages against the corporation:

The corporation complains and justly says, it has not had a fair trial; and now correctly accuses "the public" of prejudice; and, it goes right on fighting its customers to the bitter end, regardless of the merits of their claims! Sowing for another crop of public prejudice and unjust verdicts!

Of course there are instances of unjust demands against corporations as well as individuals, which it is necessary and proper to resist, but careful investigation always develop these promptly. In fact these unjust claimants count as their principal asset in contemplated litigation, the prejudice of the public already created by the record made in fighting the just claims of the weak.

To illustrate the point, by an example from a local field, showing the great good that results from the opposite treatment of customers and employes:

No one who has lived here long enough to become acquainted with the "natives" has not heard often of the harmonious relations existing for many years between the principal individual employer of labor and his employes, in the mines of this region. This long continued fair dealing resulted in such confidence and respect and good feeling between employer and employes that the corporations, which have succeeded to the business, and the sons of this man, and their neighbors who managed these corporations in the same spirit, have long been able to "bank" on the riches of his "good name"; even though nine tenths of the present employes never saw, and most of them never heard, of the man, whose good name still "keeps the peace", in the Upper Monongahela Valley.

The lawyer who has had such a client has a monument worthy of his profession.

Lawyers are in many ways our most influential citizens; and, there are usually more lawyers in our legislative bodies than any other profession or calling; and, because he is a lawyer, when he becomes a member of a legislative body, he has more influence in shaping legislation than any ten men of other lines of business.

All the judges of all the courts are lawyers, and they interpret the legislation, largely enacted by the lawyers; and, decide what the Law is.

The executive and ministerial officers are often lawyers and they administer the laws made by the lawyer-legislators, ascertained by the lawyer-judges, and, so, it may be said that the lawyers are the interpreters of the laws to the people; the "heralds of the king"; the oracles of Diana; the secular priests; confessors to the citizen in doubt; the custodians of the "fires of civil liberty"; and, of the keys to the citadel of personal freedom; the advisors, when the trouble is in its infancy; the point of contact between the citizen and the administration of the government; on the "firing line" at every "round" in the battle between right and wrong.

It is said that the lawyer should use this great power to correct the prejudices of the people, against great aggregations of wealth operated by corporations; and, of wealth in general; and curb the tendency to make and enforce stringent and hampering laws against great business corporations. And he should.

But there are reciprocal obligations: and, I suggest some, which I regard as most important: The lawyer should use his great power at every opportunity, (1) to prevent these corporate aggregations of wealth from unlawfully or improperly acquiring and encroaching upon the rights of "the public," and of individuals; (2) lead the owners and managers to know and appreciate the fact, that they owe their very existence and all their valuable property rights, to this same "public;" (3) that they are the *servants and not the masters*, of the people; (4) that they are the means "the public" permits to be used to secure the ends of good government; in providing for the convenient and orderly growth of business; securing to all the people alike, the opportunities so lavishly spread out and stored here by nature; so that the industrious and enterprising may reap greater prosperity, and many have abundant employment at a fair wage; and enjoy their prosperity and earnings in peace and safety; and, (5) to religiously and vigorously see to it, that the complaints of individuals on account of injuries to person and property are promptly, fairly and thoroughly investigated; and, if found just, promptly settled for whether the complainant be a big or a little customer, great or common people. The great ones may be dangerous in some ways if not fairly treated: but the "common citizen" holds the power of juries and majorities!

And, I vouch, that when the lawyers have trained their corporation clients to know their places their importance and use-

fulness, and their relation to the individual citizen and "the public" in our system of popular government, the prejudice against corporations in the jury box and elsewhere and, the danger from unrest of the people, will disappear like the mists of the morning; and the anarchist and his brood, whether seeking to attain his object by bribery or throwing bombs, will be ground under the public heel, as a snake, where, and whenever he appears; and, cease to menace the fair name of the Republic.

And the lawyer on the "firing line" will have the credit; and, deserve it.

"SPONTANEOUS EXCLAMATIONS"

In *People v. Del Vermo* (192 N. Y., 470,) Judge Willard Bartlett, speaking for a unanimous court, adopts the phrase "spontaneous exclamations," which has been used by Professor Wigmore (sec. 1745,) to denominate a certain kind of Hearsay evidence, which is excepted from the rule excluding Hearsay, and which, before Professor Wigmore wrote, had usually been classified under "*Res Gestae*." It appeared that a decedent immediately after he was wounded made a statement that the defendant had stabbed him. The Court of Appeals upholds the admission of the evidence of such statement on the ground that it constituted a "spontaneous exclamation." The court observes:

"Evidence is admissible of exclamatory statements declaratory of the circumstances of an injury when uttered by the injured person immediately after the injury; provided that such exclamations be spontaneously expressive of the injured person's observation of the effects of a startling occurrence, and the utterance is made within such limit of time as presumably to preclude fabrication. It will be observed that this exception contemplates and permits proof of declarations by an injured person made *after* the event, so that it cannot fairly be said that the words spoken really constituted a part of the thing done."

Professor Wigmore, at the opening of his discussion of *Res Gestae* expresses a semi-humorous despair of being able to elucidate the doctrine because of the comprehensive and loose manner in which the term has been used. He shows clearly that "spontaneous exclamations" do not logically fall within the *Res Gestae* principle at all, because they are not parts of transactions themselves, but statements relative to or characterizing completed acts.

THE LAW'S LUMBER ROOM.

Peine Forte et Dure.

In England during many centuries a prisoner was called to the bar before trial and enjoined to hold up his right hand by which act he was held to admit himself the person named in the indictment. The clerk then asked him, "How say you, are you guilty or not guilty?" If he answered "Not guilty," the next question was: "Culprit, how will you be tried?" to which he responded, "By God and my country." "God send you a good deliverance," rejoined the official, and the trial went forward. If the accused missed any of these responses, or would not speak at all, and if the offense were treason or a misdemeanor, his silence was taken for confession of guilt, and sentence was passed forthwith. If the charge were felony, a jury was impaneled to try whether he stood "mute of malice," or "mute by the visitation of God." If this last were found, the trial went on: if the other, he was solemnly warned by the judges of the terrible consequences summed up by Lord Coke (trial of Sir Richard Weston in 1615, for Sir Thomas Overbury's murder)" in the three words—*onere, frigore, et fame*. The proceedings were most commonly adjourned to give him time for reflection: but if after every exhortation he remained obdurate, then he was adjudged to suffer the *peine forte et dure*. The judgment of the court was in these words: "That you return from whence you came, to a low dungeon into which no light can enter; that you be stripped naked save a cloth about your loins, and laid down, your back upon the ground; that there be set upon your body a weight of iron as great as you can bear—and greater; that you have no sustenance save on the first day three morsels of the coarsest bread, on the second day three draughts of stagnant water from the pool nearest the prison door, on the third day again three morsels of bread as before, and such bread and such water alternately from day to day; till you be pressed to death; your hands and feet tied to posts, and a sharp stone under your back."

There is but one rational way to discuss an institution of this sort. Let us trace out its history, for thus only can we explain how it came to have an existence at all. For the prisoner himself there was usually a very strong reason why *he* should stand mute. If he were convicted of felony his goods were forfeited; while in case of capital felony the result of attainder was corruption of blood so that he could neither inherit nor trans-

mit landed property. Often he must have known that conviction was certain. Had he fondness enough for his heirs—children or other—to make him choose this hideous torture instead of milder methods whereby the law dispatched the ordinary convict from this world? Well, very many underwent the punishment. Between 1609 and 1618 the number was thirty-two (three of them women) in rural Middlesex alone. "*Mortuus en pen fort et dur*," so the clerk wrote for epitaph against each name, and something still stranger than the penalty itself is revealed to us by an examination of the original records. Many of the culprits were evidently totally destitute, and these underwent the *peine forte et dure* from stupidity, obstinacy, or sheer indifference to mortal suffering and death.

The custom of pressing did not obtain its full development at once, and there is some difficulty as to how it began. A plausible explanation is given in Pike's "History of Crime," and is supported by the authority of the late Mr. Justice Stephen. At one time a man charged with a serious offense was tried by ordeal; but by paying money to the king it was possible to get the exceptional privilege of a trial by jury. Thus, when the accused was asked how he would be tried, his answer originally ran, "By God" (equal to by ordeal), or "By my country" (equal to by jury), since to put yourself on the country meant to submit yourself to this last. But trial by ordeal was abolished about 1215, and the alternative was a privilege to be claimed, not a necessity to be endured. Offenders soon discovered that by standing mute and declining to claim this privilege, they put the court in a difficulty. The ideas of those distant days were simple exceedingly, and a legal form had strange force and efficacy. To put a prisoner before a jury without his consent was not to be thought of; but how to get his consent? At first the knot was rather cut than loosened. Thus, in some cases, the accused were put to death right off for not consenting to be tried "according to the law and custom of the realm." Then this was held too severe, and under Edward I., in the proceedings of the Parliament of Westminster, occurs the earliest definite mention of the punishment. It was enacted that notorious felons refusing to plead should be confined in the prison *forte et dure*. Here they went "barefooted and hareheaded in their coat only in prison, upon the bare ground continually, night and day, fastened down with irons," and only eating and drinking on alternate days as already set forth. It was bad enough, no doubt, but not of necessity fatal. So the authorities perceived, and

they again cut the knot by a policy of starvation. So one infers from the case of Cecilia, wife of John Rygeaway, in the time of Edward III. Cecilia was indicted for the murder of her husband; she refused to plead. Being committed to prison, she lived without meat or drink for forty days; and this being set down to the Virgin Mary, she was thereupon allowed to go free. This procedure seems to have been found too slow, and the increase of business at the assizes seemed to end in a hopeless block. Were the judges to encamp in a country town while the prisoners made up their mind as to pleading? Something was wanted to "mend or end" the stubborn rascals; and under Henry IV., in the beginning of the fifteenth century, the "prison" *forte et dure* became the "peine" *forte et dures* with the consequence that, if the accused declined to plead, there was an end of him in a few hours, the provision of bread and water being a mere remnant of the older form of sentence. This procedure lasted till 1722, when the 12 Geo. III., c. 20, made "standing mute in cases of felony equivalent to conviction." In 1827 it was enacted by 7 and 8 Geo. IV., c. 28, "that in such cases a plea of not guilty should be entered for the person accused." The curious formal dialogue between the clerk and the prisoner was abolished that same year. Something stronger than exhortation was now and again used before the obdurate prisoner was sentenced to pressing: thus at Old Bailey, in 1734, the thumbs of one John Durant were tied together with whipcord, which the executioner strung up hard and tight in presence of the court; he was promised the *peine forte et dure* if this did not answer, but upon a little time being given him for reflection, he speedily made up his mind to plead not guilty. It is difficult to explain the distinction drawn between ordinary felony on the one hand and treason and misdemeanors on the other. Perhaps the explanation is that the last, being much lighter offenses, were never made the subject of trial by ordeal, and that treason being a crime endangering the very existence of the state, a sort of necessity compelled the judge to proceed in the most summary manner. No student of English history needed to be reminded that a trial for treason resulted almost as a matter of course in a conviction for treason. Peers of the realm had many privileges, but they were not exempt from the consequences of standing mute. Nor, as already noted, were women. Perhaps it were unreasonable to expect a criticism of the system from contemporary judges or text writers; but what they did say was odd enough; they did not condemn pressing,

but they highly extolled the clemency of the law which directed the court to reason with and admonish the accused before it submitted him to this dread penalty.

I shall now give some examples of practice. Fortunately (or unfortunately you may think as you read) we have at least one case recorded in great detail, though, curiously enough, it has escaped the notice of an authority so eminent as Mr. Justice Stephen.

Margaret Clitherow was pressed to death at York on Lady Day, March 25, 1586, and the story thereof was written by John Mush, secular priest, and her spiritual director. Margaret's husband was a Protestant, though his brother was a priest, and all his children appear to have been of the older faith. Accused of harboring Jesuit and Seminary priests, of hearing mass, and so on, she was committed to York Castle, and in due time was arraigned in the Common Hall. In answer to the usual questions she said that she would be tried "by God and by your own consciences," and refused to make any other answer. It was sheer obstinacy; she was a married woman, and she could have lost nothing by going to trial. But she coveted martyrdom, which everybody concerned appears, at first at any rate, to have been anxious to deny her. It was plainly intimated that if she would let herself be tried she would escape. "I think the country" said Clinch, the senior judge, "cannot find you guilty upon the slender evidence." The proceedings were adjourned, and the same night "Parson Whigington, a Puritan preacher," came and argued with her, apparently in the hope of persuading her to plead: but he failed to change her purpose; the next day she was brought back to the hall. Something of a wrangle ensued between herself and Clinch, and in the end the latter seemed on the point of pronouncing sentence. Then Whigington stood up and began to speak. "The murmuring and noise in the hall would not suffer him to be heard:" but he would not be put off, and "the judge commanded silence to hear him." He made a passionate appeal to the court ("did not, perhaps, God open the mouth of Balaam's ass?" is the somewhat ungracious comment of Father Mush). "My lord," said he, "take heed what you do. You sit here to do justice; this woman's case is touching life and death: you ought not, either by God's law or man's, to judge her to die upon the slender witness of a boy;" with much more to the same effect. Clinch was at his wits' end, and went so far as to entreat the prisoner to plead in the proper form: "Good woman, I pray you put yourself to the country.

There is no evidence but a boy against you, and whatsoever they (the jury) do, yet we may show mercy afterwards." She was moved not a whit; and then Rhodes, the other judge, broke in: "Why stand we all day about this naughty, wilful woman?" Yet once again she was entreated, but as vainly as before; it was evident that the law must take its course; and "then the judge bade the sheriff look to her, who pinioned her arms with a cord." She was carried back to prison through the crowd, of whom some said "she received comfort from the Holy Ghost;" others, "that she was possessed of a merry devil." When her husband was told of her condemnation, "he fared like a man out of his wits, and wept so vehemently that the blood gushed out of his nose in great quantity." Some of the council suggested that she was with child. There seems to have been some foundation for the remark, at any rate, Clinch caught eagerly at the idea. "God defend she should die if she be with child," said he several times, when the sheriff asked for directions, and others of sterner mould were pressing for her dispatch. Kind-hearted Whigington tried again and again to persuade her; and the Lord Mayor of York, who had married her mother ("a rich widow which died before this tragedy the summer last") begged her on his knees, "with great show of sorrow and affection," to pronounce the words that had such strange efficacy. It was all in vain, so at last even Whigington abandoned his attempt, and "after he had pitied her case awhile, he departed and came no more."

Her execution was fixed for Friday, and the fact was notified to her the night before. In the early morning of her last day on earth she quietly talked the matter over with another woman. "I will procure," the woman said, "some friends to lay weight on you, that you may be quickly dispatched from your pain." She answered her that it must not be. At eight the sheriffs came for her, and "she went barefoot and barelegged, her gown loose about her." The short street was crowded with people, to whom she dealt forth alms. At the appointed place, one of the sheriffs, "abhorring the cruel fact, stood weeping at the door," but the other, whose name was Fawcett, was of harder stuff. He "commanded her to put off her apparel," whereupon she and the other woman "requested him, on their knees, that she might die in her smock, and that for the honor of womankind they would not see her naked." That could not be granted, but they were allowed to clothe her in a long habit of linen she had herself prepared for the occasion. She now lay

down on the ground. On her face was a handkerchief. A door was laid upon her. "Her hands she joined towards her face;" but Fawcett said they must be bound, and bound they were to two posts, "so that her body and her arms made a perfect cross." They continued to vex the passing soul with vain words, but at last they put the weight on the door. In her intolerable anguish she gave but a single cry: "Jesu! Jesu! Jesu! have mercy upon me!" Then there was stillness; though the end was not yet. "She was in dying one-quarter of an hour. A sharp stone as much as a man's fist put under her back, upon her was laid a quantity of seven or eight hundredweight to the last which breaking her ribs, caused them to burst forth of the skin." It was now nine in the morning, but not till three of the afternoon were the bruised remains taken from the press.

Stories of violence and cruelty serve not our purpose unless they illustrate some point, and I shall but refer to two other cases.

Major Strangeways was arraigned in 1658 (under the Commonwealth, be it noted) for the murder of his brother-in-law. In presence of the coroner's jury he was made to take the corpse by the hand and touch its wounds, for it was supposed that, if he were guilty, these would bleed afresh. There was no bleeding, but this availed him nothing, and he was put on his trial at the Old Bailey in due course. He refused to plead, and made no secret of his motive: he foresaw conviction, and desired to prevent the forfeiture of his estate. He was ordered to undergo the *prine forte et dure*. The press was put on him angle-wise; it was enough to hurt, but not to kill, so the bystanders benevolently added their weight, and in ten minutes all was over. The dead body was then displayed to the public.

Again, in 1726, a man named Burnwerth was arraigned at Kingston for murder. At first he refused to plead, but after being pressed for an hour and three-quarters with four hundredweight of iron, he yielded. He was carried back to the dock, said he was not guilty, and was tried, convicted, and hanged. There was at least one case in the reign of George II.—but enough of such horrors.

"Forethought and experience are widely different monitors." *Per* Robinson, J., in *Graney v. St. Louis*, 141 Mo. 180, 42 S. W. Rep. 742.

THE BAR

THE BAR

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THE END OF THE DANBURY HATTERS CASE.

A very able Associate Justice of the Supreme Court of the United States recently said:

"The future of our free institutions depends upon the courage, the intelligence and the fidelity of the American lawyer."

We are reminded of this by the termination of the case which has passed into history under the name of the Danbury Hatters case. The case will undoubtedly rank among the great forensic contests in which the freedom of the individual was the vital issue involved. LOEWE, the plaintiff, was a hatter by trade and had by patient industry and thrift worked his way from the journeyman's bench to the ownership of a small manufactory the products of which were shipped through the channels of interstate commerce to wholesale dealers in States as far west as California. His relations with his workmen were most harmonious. He treated them fairly and gave them employment without respect to any question as to whether they were or were not members of labor unions. He paid them a fair wage, with which they were entirely satisfied, and having himself worked at the bench and being a man of simple, unpretentious and democratic tastes his relations with his workmen were ideal.

The United States hatters' organization, at that time flourishing and seemingly within its scope all powerful, had resolved that no man should be allowed to work in any hat factory of the United States except as a member of that organization and subject to the discipline of its leaders. By the threat of ruin they had effectually sandbagged nearly every hat factory in this country into submission. A Philadelphia manufacturer who attempted to resist them sank a fortune in the unequal fight and at last temporarily submitted, and only a few independent hatters remained who had refused to accept the yoke. Among these was LOEWE, a man of very moderate means and financially but poorly equipped to wage an unequal struggle with a powerful union of considerable resources.

To make the struggle more unequal and hazardous the United Hatters was itself a subsidiary organization of the American Federation of Labor, which boasted a membership of two millions of men and whose power to proscribe a manufacturer was so great that the so-called "unfair" list of the American Federation of Labor had effectually terrorized a considerable number of American manufacturers.

When Mr. LOEWE's lawyer, DANIEL DAVENPORT of Bridgeport, Conn., first attempted to organize the employers for active resistance it was difficult for him to obtain an audience, and when he did so it was behind closed doors and almost in stage whispers. Mr. DAVENPORT was then a rising lawyer at the Connecticut bar, with enviable prospects of professional and political advancement. Impressed with the deep necessity of putting an end to the tyranny of trade unionism, he took up Mr. LOEWE's cause and began the suit which has now been successfully ended. Leaving behind him his practice and with unselfish disregard of his political prospects, he organized the spirit of revolt against this particularly offensive form of social tyranny. He drew the complaint with great professional skill, collected with unwearying industry the testimony, which was so extensive that it required twelve weeks for its presentation, and made so powerful an impression upon a jury, itself largely composed of wage earners, that the twelve "good men and true" found a verdict in favor of LOEWE for the full amount of his claim.

While in the Supreme Court of the United States Mr. DAVENPORT had the co-operation of distinguished counsel in the argument of the fundamental question involved, yet the chief difficulty of the case was not so much the argument of the underlying legal proposition as it was the collection of the evidence to support the averments of the complaint. The final triumph of LOEWE and his independent workmen is therefore largely due to Mr. DAVENPORT's presentation of the testimony in so effective a form and manner that the jurymen could not, without a palpable violation of their oaths, fail to recognize the plaintiff's claim.

The termination of the Danbury Hatters case therefore is a notable professional triumph for DANIEL DAVENPORT. He stood not merely for the enforcement of law but successfully championed the cause of every independent manufacturer and of that considerable majority of the American wage earners who prefer to work free from the arbitrary dictation of labor organizations.

To Mr. LOEWE and Mr. DAVENPORT THE SUN presents its compliments. Special recognition is due them both for exceptional public service. They have fought a good fight, and with results that will have a considerable and beneficial influence upon the future of this country. Mr. LOEWE has successfully asserted the right of every manufacturer to exist and employ his

capital in productive industry without asking the permission of Mr. SAMUEL GOMPERS and Mr. JOHN MITCHELL. Mr. LOEWE and Mr. DAVENPORT have vindicated the right of every wage earner to sell the product of his hands without subjecting himself to the iron discipline of an arrogant labor oligarchy. They have created a sentiment of independence which will be powerfully felt in the future, and Mr. DAVENPORT has thus illustrated the statement of the Supreme Court Justice which we quoted as to the value of a courageous bar in a free country.

NATURAL GAS AS AN ARTICLE OF INTERSTATE COMMERCE.

In 1907, the Legislature of Oklahoma passed a statute regulating the transportation of natural gas. Judged by its title, it seemed a very appropriate and inoffensive piece of legislation designed for inspection of pipe lines, limiting gas pressure, etc., and indicating modes of exercise of power of eminent domain by pipe line companies. An examination of section 8 of the Act, however, disclosed the fact that the real object of the act was to prevent the transmission of natural gas to points without the state. It was claimed that natural gas is not a subject of ownership as ordinary property, but should be considered as being similar to "animals *ferae naturae*, running streams, the air we breathe and forest reserves which are the common property of the whole people." To this contention the United States Circuit Court in *Kansas Natural Gas Co. v. Haskell*, 172 Federal Reporter, 545, refused to agree, but held that on reduction to possession of natural gas it becomes subject to right of property with power of barter, sale, right of transportation and delivery, the same as any other kind of property. This being true, the question then arose as to whether the statute constituted an interference with property rights and interstate commerce. The court comes unhesitatingly to the determination that it does, and that it is therefore in violation of both the national and state Constitutions. The decision closes with a rhetorical peroration denouncing the act in the strongest terms as being utterly inconsistent with western hospitality and southern chivalry in attempting to shut out sister states from enjoyment of portions of the natural resources of Oklahoma in exchange for other desirable commodities.

LIBEL—WHAT CONSTITUTES DEFAMATION—
IDENTIFY.

The recent decision of the Supreme Court of the United States in *Peck vs. The Tribune Co.* (May 1909, reported in the *Chicago Legal News* for June 5, 1909), displays a very liberal spirit in recognizing a cause of action. The publication is described in the opinion as follows:

.. "Nurse and Patients Praise Duffy's—Mrs. A. Schuman, One of Chicago's Most Capable and experienced Nurses, Pays an Eloquent Tribute to the Great Invigorating, Life-Giving and Curative Properties of Duffy's Pure Malt Whiskey." * * * Then followed a portrait of the plaintiff, with the words 'Mrs. A. Schuman' under it. Then, in quotation marks, 'After years of constant use of your pure malt whiskey, both by myself and as given to patients in my capacity as nurse, I have no hesitation in recommending it as the very best tonic and stimulant for all weak and run down conditions.' &c., &c., with the words 'Mrs. A. Schuman, 1576 Mozart street, Chicago, Ill., at the end, not in quotation marks, but conveying the notion of a signature, or at least that the words were hers. The declaration alleged that the plaintiff was not Mrs. Schuman, was not a nurse, and was a total abstainer from whiskey and all spirituous liquors. There was also a count for publishing the plaintiff's likeness without leave. The defendant pleaded not guilty."

The Circuit Court of Appeals (154 Fed. R., 330) held that the publication in question did not constitute libel *per se*, and in the absence of an allegation of special damage would not support an action. The Supreme Court of the United States, reversing the judgment entered on that decision, holds that the direction of a verdict for the defendant was error, saying in part:

"The question, then, is whether the publication was a libel. It was held by the Circuit Court of Appeals not to be, or at most to entitle the plaintiff only to nominal damages, no special damage being alleged. It was pointed out that there was no general consensus of opinion that to drink whiskey is wrong or that to be a nurse is discreditable. It might have been added that very possibly giving a certificate and the use of one's portrait in aid of an advertisement would be regarded with irony, or a stronger feeling, only by a few. But it appears to us that such inquiries are beside the point. It may be that the action for libel is of little use, but while it is maintained it should be governed

by the general principles of tort. If the advertisement obviously would hurt the plaintiff in the estimation of an important and respectable part of the community liability is not a question of a majority vote.

We know of no decision in which this matter is discussed upon principle. But obviously an unprivileged falsehood need not entail universal hatred to constitute a cause of action. No falsehood is thought about or even known by all the world. No conduct is hated by all. That it will be known by a large number and will lead an appreciable fraction of that number to regard the plaintiff with contempt is enough to do her practical harm. Thus, if a doctor were represented as advertising, the fact that it would affect his standing with others of his profession might make the representation actionable, although advertising is not reputed dishonest and even seems to be regarded by many with pride. (See *Martin v. The Picayune*, 115 La., 979.) It seems to us impossible to say that the obvious tendency of what is imputed to the plaintiff by this advertisement is not seriously to hurt her standing with a considerable and respectable class in the community. Therefore it was the plaintiff's right to prove her case and go to the jury, and the defendant would have got all that it could ask if it had been permitted to persuade them, if it could, to take a contrary view (*Culmer v. Canby*, 101 Fed. Rep., 195, 197; *Twombly v. Monroe*, 136 Mass., 464, 469; see *Gates v. N. Y. Recorder Co.*, 155 N. Y., 228).

THE LAWYER'S OATH A CODE OF ETHICS.

J. H. Benton, Esq., of Boston, in his interesting brochure on "The Lawyer's Official Oath and Office" says:—

Why is any oath required for admission to the practice of the law? No oath is required by law for admission to practice in any other profession, even where qualifications to practice are prescribed or ascertained by examinations required by law, as in the case of physicians. But an official oath has always been required for admission to the practice of the law. Why is it required? What is its significance, and what obligation does it impose?

The significance of the lawyer's oath is that it stamps the lawyer as an officer of the state, with rights, powers and duties as important as those of the Judges of the Courts themselves. When a lawyer is admitted to practice and takes the required oath of office he has as much right to discharge the duties of his

office as a representative or senator has to sit and act in the Legislature, or a Governor to exercise the functions of a chief magistrate. He has as much right to appear in Court and be heard for a party to a cause as a Judge has to hear and decide the cause. *A lawyer is not the servant of his client. He is not the servant of the Court.* He is an officer of the Court, with all the rights and responsibilities which the character of his office gives and imposes.

He is also an officer for life whose office cannot be taken from him except for cause established by due process of law upon proof, hearing and judicial determination.

It is therefore of the highest importance that the lawyer's oath should not only be uniform in all our courts, but that it should be so framed as to indicate the duties and responsibilities of those who take it. In short, the lawyer's oath should be a condensed code of legal ethics. And this is what it was in England and in America from the beginning, until by a reaction against the multiplicity of oaths imposed by law and of oaths taken without warrant of law, the lawyer's oath was so changed in form as to be now in most of the State Courts and in all the Federal Courts only a mere obligation to discharge faithfully the duties of the office of an attorney.

The old oath prescribed in Connecticut in 1708 ran thus:—

"It is ordained by this Court and the authorities thereof 'That no person, except in his own case, shall be admitted to make any plea at the bar, without being first approved of by the court before whom the plea is to be made, nor until he shall take in the said court the following oath, viz. :—

"You shall do no falsehood, nor consent to any to be done in the court, and if you shall know of any to be done you shall give knowledge thereof to the justices of the court, or some of them, that it may be reformed. You shall not wittingly and willingly promote, sue or procure to be sued any false or unlawful suit, nor give aid or consent to the same. You shall delay no man for lucre or malice, but you shall use yourself in the office of an Attorney within the court according to the best of your learning and discretion, and with all good fidelity, as well to the court as to the client. So help you God."

"Has little Mrs. R. consoled herself over her husband's death yet?"

Oh, no, not yet! You know what a long time these insurance companies take to pay!"

MISCONDUCT OF PUBLIC PROSECUTOR.

We have on many former occasions treated of similar misconduct on the part of public prosecutors, and the case of *State v. Montgomery*, in the Supreme Court of Washington (December, 1909, 105 Pac., 1035), affords a recent example. The representative of the people was not only guilty of the very common abuse of unfair statement of the evidence and violent invective in the course of the trial, but he also resorted to a culpable expedient for obtaining evidence for a conviction. The court quotes from former judicial utterances in the courts of different States upon the duty of moderation and quasi-judiciality, and closed with this language of its own:

"It is not our purpose to condemn the zeal manifested by the prosecuting attorney in this case. We know that such officers meet with many surprises and disappointments in the discharge of their official duties. They have to deal with all that is selfish and malicious, knavish and criminal, coarse and brutal, in human life, but the safeguards which the wisdom of ages has thrown around persons accused of crime cannot be disregarded, and such officers are reminded that a fearless, impartial discharge of public duty, accompanied by a spirit of fairness toward the accused, is the highest commendation they can hope for. Their devotion to duty is not measured, like the prowess of the savage, by the number of their victims."

It is a little remarkable that the court expressly disclaim a purpose to condemn the zeal of the prosecuting attorney in view of the serious infraction of professional propriety already referred to. It appeared that on the trial, which was for statutory rape, the prosecutrix testified that defendant never had sexual intercourse with her. The prosecuting attorney then stated that the witness had stated the contrary to him many times; that she had been tampered with and bought, etc. The prosecution was then permitted to question prosecutrix at length as to the admissions of sexual intercourse with defendant. Prosecutrix admitted making the statements, but insisted that they were false. After leaving the witness stand, to be recalled later, prosecutrix was taken to the prosecuting attorney's office, and then to the juvenile detention room, and placed in charge of the matron. Before leaving her the prosecuting attorney told her that he could send her to prison for perjury, and the matron told her that she would find the prosecuting attorney a very good friend, but a very powerful enemy. After-

wards prosecutrix testified fully against defendant. It was held that the witness was put under duress, and that her testimony was not voluntarily given when she took the stand the second time and testified against defendant, and was improperly admitted.—N. Y. Law Journal.

BANISH ALL LAWYERS.

Have you seen "Virginia Colonial Decisions?" If not, look it up, and read Mr. Barton's interesting introduction upon colonial conditions, which might apply to all the early American colonies.

Here is an account of laws against lawyers in the seventeenth century:—

The enactment of such laws was, of course, a fairly good indication of the need of them in the first half of the seventeenth century. There was but little business then for lawyers, of a legitimate character, and they lived more by their practices than upon their practice. "The legal profession," says Mr. Fiske, "was at first held in somewhat low repute, being sometimes recruited by freed men whose careers of rascality as attorneys in England had suddenly ended in penal servitude." Their capacities for mischief were only limited by their opportunities, and the exercise of their talents in this direction made them the subject for many years of most drastic legislation. This was by no means a uniform condition, and after the middle of the seventeenth century and especially in the first half of the eighteenth century the profession grew rapidly in importance and improved in character. Professor John B. Minor thought that the adverse legislation of 1642 and subsequently, was due to jealousy between the aristocracy of birth represented by the Assembly and the aristocracy of merit represented by the lawyers. But Mr. Chitwood, who quotes Mr. Minor's views, thought it "more probable that this unfriendly attitude of the ruling class towards the legal fraternity was caused by the lack of ability and character of the early lawyers." The last is doubtless the real reason, but lawyers as a class, in spite of the great political, religious and social influence of the profession have never been popular with the masses, and consequently proportionately unpopular with the elected representatives.

By the planters, who mainly made up the membership of the General Assembly during the earlier years, it is not to be

wondered at that the whole race of lawyers should be regarded with some degree of contempt, even at their best, but the crowd of mere mercenary adventurers who by stirring up litigation for the profit which might be in it, destroyed the peace and good feeling of the country neighborhoods, naturally provoked the utmost efforts for their extermination by whatever means the law could afford.

The poor legislators in their endeavors to find a remedy were between the devil and the deep sea, and so they remained for many years to come, indeed until conditions had begun to better themselves, but not by reason of any of their acts; for, untaught by their experience of the inadequateness of the legislative remedies, they continued to enact and re-enact them from session to session, mending here and there a weak spot and making another, still hoping, no doubt, that they would at last find some plaster that would draw. Finally, apparently as a radical resort, it was, on March 26, 1658 by the Assembly "proposed whether a regulation or a total ejection of lawyers." On the vote the burgesses said, "An ejection."

Divesture of Jurisdiction.

Mr. Justice Brown of the United States Supreme Court, retired, relates one of the stories that the late Justice Brewer was so fond of telling, which goes to show that eminent jurist's high regard for the law. He relates that a justice of the peace owned a farm in Kansas that borders on Missouri.

One day the justice was sitting on a fence, built directly on the State line, superintending some work his son and a farm-hand were doing. The son and his companion engaged in a dispute, which ended in a fistfight. The justice of the peace, Justice Brewer would explain, watched the encounter for a few minutes, and then shouted in a loud voice:

" 'Gentlemen, in the name of the law of the State of Kansas and by virtue of my authority, I command you to desist.' "

"Just then the rail broke, "continued Justice Brewer, "and the justice of the peace landed in Missouri. Arising to his feet, he exclaimed:

" 'Give him hell, son; I have lost my jurisdiction.' "

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The Bar

VOL. XVIII ~~XVII~~

NOVEMBER, 1910

No. 11

THE BAR

Official Journal of the
WEST VIRGINIA BAR ASSOCIATION

Under the Editorial Charge of the
Executive Council.

Published Monthly from October
to May Bi-Monthly from June
to September.

Entered as second class matter
August 11, 1904, Postoffice, Mor-
gantown, W. Va., under the Act
of Congress, March 3rd, 1879.

Price, per copy.....\$.10
Yearly, in advance..... 1.00

Advertising Rates on Request.

All Circuit Clerks are author-
ized agents to receive and receipt
for subscriptions. Address all
communications to THE BAR,
Morgantown, W. Va.

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Is the Bar of West Virginia Interested? Let's Do Something!

To reform or not to reform--that's the question!

Reformation of the procedure in our courts would cure three-fourth of the defects complained of in the administration of justice.

It has been demonstrated beyond a peradventure that legislation cannot do it, and the legislature will not do it.

To call upon the legislature to make rules of procedure for the courts, is like calling on a lot of mechanics to prescribe rules of hygiene for the sick.

Evidently, indisputably, and as a matter of common sense, those most familiar with the administration of the Courts are the most competent, and the only competent persons to make rules regulating their procedure.

A shining example of regulating courts by legislation is the 125th chapter of the code of West Virginia!

The shining results of that legislation are the delays, uncertainties, expensiveness, and miscarriage of justice

Shall we continue this thing--or shall we put this matter of reforming the procedure in the hands of those who know the defects and know the remedies in our imperfect court machinery?

We have heretofore proposed, in these pages, that West Virginia become the pioneer in reforming the courts by putting this responsibility in the hands of a Commission of judges, duly constituted by law, and having not only the authority, but the duty imposed upon them to make promulgate and print a Code of Rules that should have the authority of law and be binding on all the Courts of the State.

We believe the judgment of the bar of the state to be that that course promises more substantial results than all the leg-

islation that may be attempted in the next hundred years.

The profession knows; the intelligent public knows; every man of average intelligence knows; that a reform of this kind must come from the members of the legal profession.

We venture to predict that if a Commission such as we propose, should undertake, and put in operation such a scheme of reform it would not be twelve months until the transformation of our Courts from the slow-going bungling methods of the present, would attract not only the attention of the State but of the whole country, and become the easy, as it would be the natural gate to reform throughout the nation.

This is not an original proposition with us, nor is it an experiment. The details of procedure in the courts under the Common law were given into the hands of the judges; and it was given to the Supreme Court of the United States in Equity and Admiralty practice by the act of 1843. It was given to the same court by the bankruptcy act of 1898, and by the copy-right act of 1909. It has also been given the recently organized Municipal Court of Chicago.

Why should it not be given—or rather imposed upon—a Commission composed of all the Circuit judges of West Virginia?

The principle—or the essence of the principle—was proposed as the basis of Court reform, by the Committee of the American Bar Association to suggest remedies and formulate proposed laws to prevent delay and unnecessary cost in litigation, and was discussed at length at its last meeting, and forcibly commended.

Some of the reasons advanced by that committee of able lawyers, are conclusive and convincing to every lawyer who reads. It was urged in favor of Court-made-rules as against legislative rules, that no one can lay down details of procedure in advance with much assurance that they will not require frequent modification, therefore changes of details should be easy to make. Hard and fast legislation operates to perpetuate a

pernicious rule of procedure until it become so incorporated in the practice that it is accepted as an established institution.

Says the report:

The judges are best qualified to determine what experiences requires and what the rule is actually working."

"The opinion of the bar as to the working of a rule may be made known to and made to effect the action of the Judges in framing new rules or improving old ones much more easily and with better results than where the legislature must be applied to."

"Small matters do not interest the legis'lature and it is almost impossible to correct them."

"Too often details in which some one member of the legislature has a personal interest are dealt with by legislation and not always in accord with the real advantages of procedure."

"As experience shows what changes are needed and what they are, there ought to be a speedy adjustment of the rules, and only rules of court can meet this demand."

There are some things that cannot be argued, they are so evident—and this is one of them—that rules of Court made by a Commission of judges can, and almost surely will, correct the chief defects complained of in our courts.

Then, why not?

The plan is most simple and practicable.

All we need is a brief general practice act, as a substitute for chapter 125 of the code, that shall prescribe only the general features of procedure and the general lines to be followed, leaving details to be fixed by Rules of Court made by a Commission of judges having the authority of law, not only to make them, but the obligation of law to enforce them, and from time to time change or add to them as the commission may deem wise.

If the bar of the State wants this they can get it.

If the bar of the State will wake up and take a little interest, they can get this from the next legislature.

Send to THE BAR your views and suggestions and we can thus get together on a definite proposition and plan of action.

An Unique Personality

It must be conceded that ex-President Roosevelt is the most novel and entertaining figure that has ever appeared in American public life.

He is a study—a prodigy of energy, activity, endurance, versatility and irrepressibility.

His future promises to be as interesting and exceptional as his past.

With his political tenets THE BAR has nothing to do. But his ideals of law, of legal procedure and government are exotic and execrable, law, friendship, and the obligations of courtesy have small consideration in his methods. His chief implements are the big stick and the steam roller.

But it is due him, and must be conceded by partisans and opponents, that he has raised and made prominent and effective the most vital issue that has ever been presented to the American people and the American nation—that of eradicating the all-pervading corruption that has crept into our public life, the low moral tone of all avenues of our business life. We have been amazed, yet compelled to concede through his pressing of this issue, that the whole country is honeycombed with graft, and dishonesty and pelf, and that a low moral standard has the country in its grip, and is eating like a cancer at the very vitals of the Nation.

Mr. Roosevelt has gone over the country preaching a return to the old time morality as no other man in his position and of his antecedents has ever done or could do. He has done more to arouse attention to this need of the time than all the preaching of all the churches. He has cried aloud from the platform and the hustings, before all kinds of audiences, and in all kinds of places for virtue in the individual citizen, in private and public life as the *sine qua non* to good govern

ment and a great nation. He has gained a hearing on these common place topics and platitudes as no other man could.

We honor him for this work.

We like this issue better than the "New Nationalism," and we hope he will stick to it.

Two Circuit Judges on Reforming Procedure

We call special attention of our readers to two papers in this issue, by Judges of our Circuit Courts, relating to the proposition of reforming the procedure through a code of rules made by a Commission of judges, as a substitute for chap. 125 of the general code.

The one is a ringing article by Circuit Judge J. C. McWhorter, setting forth in vivid yet conservative terms the inexcusable and damaging defects in our existing procedure, and suggesting remedies therefor. It is an irrefutable indictment by a man on the bench who deals with these matters at close quarters day by day and knows whereof he speaks. It is a call to action to the Bar of the State that ought to be heeded as a direct obligation resting upon the legal profession.

The other article is by Judge H. H. Moss, of the fourth Circuit, who makes an equally emphatic and conclusive condemnation of the defects in our procedure, but is skeptical about the remedy we propose.

The objections which Judge Moss sees to the remedy are hurriedly taken, and, in our view, they are not substantial or inseparable. Even if they were substantial they do not weigh against the inestimable gain in view if the plan works out.

That the Circuit Judges are overworked and would not have time to formulate a code of rules, is a fact that might be conceded, but the State can afford to give them time and make more judges if that will bring about the reform in view. In fact the reforms themselves would give them more time—they would so far facilitate the business of the Circuit Court that the

judges would have time to spare. One week out of the year would be ample for the Commission to make and revise the code of rules, and what does that weigh against the results promised? If all the courts would suspend business for one week in the year it would be a negligible incident compared with the existing bedlam.

The other difficulty which Judge Moss sees is that "Nothing but a binding law of the law making power of this State will I submit, ever afford anything but partial and eneffectual relief."

With this statement we agree without any qualification. Therefore the scheme contemplates that this code of rules when made shall be a "binding law of the law making power" as binding as any provision of the present code—as binding as chapter 125 which now regulates? (Fails to regulate) the existing procedure.

Judge Moss' head is level but he has gone wool gathering in this instance, and when he gets back, we hope he will send THE BAR his revised views in this connection.

We hope all the judges will have something to say in this connection.

TECHNICAL.—"I will tell you what kind of a lawyer Pones is," said the judge, in reply to a request for such information.

"He's so technical that he will fall over a crowbar to hunt for a pin, and not even see the crowbar, mind you."—Youth's Companion.

SELF PROTECTION.—"Prisoner at the bar," said the portly, pompous, and florid magistrate, according to the London Daily News, "you are charged with stealing a pig, a very serious offense in this district. There has been a great deal of pig stealing, and I shall make an example of you, or none of us will be safe."

Farmers believe so thoroughly in the gospel of work that they even work their butter; and, like all else, it is the better for being worked.

No Standing in Any Court

John Jones and John Brown have been doing business together and they separate.

Jones alleges that Brown owes him ten million dollars. Brown offers to go into a settlement, but Jones declines.

Thereupon Jones issues ten millions of negotiable promissory notes in Brown's name, without his authority, without his concurrence direct or indirect, and even without his knowledge; puts them on the market and pockets the proceeds.

Pay day comes around for these promissory notes, and the holders demand payment of Brown, who repudiates them, saying they are not his. Then the several hundred holders of these Brown notes get together and place them in the hands of Jones, who agrees for a consideration, to institute suit against Brown for their collection.

Will any lawyer say that a case founded on such a basis and seeking recovery for the holders of these spurious notes issued by the Plaintiff should have any standing in law?

Yet this is the case of the State of Virginia vs. West Virginia now pending in the United States Supreme Court.

Covered up as adroitly as it may be the bottom fact is that the spurious Certificates or due bills issued by Virginia in the name of West Virginia are the basis of that suit.

The holders of those certificates are the real plaintiffs in that case, and they will be the real beneficiaries if a judgment is rendered against West Virginia.

There are hundreds of citizens of West Virginia who are holders of these certificates (the records show it) who are contributing to the costs of that suit who are numbered among the real plaintiffs and the prospective beneficiaries, and seeking to make their state liable for a debt she never contracted, and does not owe on any principle of law and equity.

But on a plain square issue, if the curtain were lifted and the real plaintiffs disclosed, and the real basis of their claim recited

in the pleadings, would such a claim have any standing in any court of law or equity in this land?

A Business Proposition

At the last meeting of the State Bar Association the Executive Council was authorized to have some of the volumes of THE BAR bound as a substitute for the year book to make a connected history of the work and proceedings of the Association.

There are a number of the bound volumes of the year book on hand comprising the proceedings from the first meeting up to and including the year 1892. It is improbable that a complete set of the year books will be obtained up to this time, and it is proposed to bind a number of volumes of THE BAR to cover the period from 1892 to date—these to be placed in the law libraries of the State University and Charleston for permanent preservation.

It is thought probable that a number of members of the Association would like to have copies of these bound volumes as their private property, and would be willing to pay a small price for them in excess of the cost of binding. If so, this would enable the Association to get the bound volumes it wants for the archives free of cost, and would enable members who want them as their private property to get them at small cost—as a better contract can be gotten for binding a large than a small number.

It is assumed that those who want them for private use, will be willing to pay, say \$2. per volume; that to include the inside and outside—THE BAR itself and the binding; or for the binding only to those who have a file and will furnish it, say \$1. per volume.

Any members of the Association who want to subscribe to the above proposition, please drop a postal card to THE BAR, stating how many volumes they will take. Please be prompt, so that the Executive Council may know what to depend on

The Law of The Road

There will be some automobile law enacted for West Virginia at the coming session of the legislature.

This is assured by the fact that both the automobilist and the non-automobilists are moving in that direction--the former to have a liberal enactment defining their rights to the road, and the latter to prevent being run off the road.

There ought not to be any extreme legislation on either side. Any law that does not make a reasonable recognition of the rights of each, but is prompted by bias or prejudice against one or the other interests will not last and will not be profitable in the end to the class in whose interests it is obtained.

It must be recognized as a fundamental basis of any law, that both the automobile and the ordinary horse vehicle have rights in the public road. The automobile has come to stay, but being the strongest and most formidable, its owners will take the road if the law is silent, and the old time vehicle will have to take to the woods if the law does not protect it and regulate the respective rights of each. That is about the present situation.

Any new law made, dealing with a new subject and therefore experimental is almost sure to be superficial and ineffectual as an original proposition. This State has had but a short and limited experience in dealing with this subject, and it, therefore, behooves the legislature to take note of the laws enacted and to some extent perfected by the older States where automobiles are more numerous and the different phases of the subject have been fought over and settled between the conflicting interests.

We believe the State of New York has on its statute books the most comprehensive and at the same time the most conservative law that has yet been achieved. We hope the legislator who aspires to champion any law on this subject in the West Virginia Legislature will not fail to consult the New York statute. Indeed, we would like to see this statute adopted in toto for

West Virginia. It is the product of the largest experience and experimentation that has ever been made in this country on this line.

Any one interested can have it by dropping a postal card to one of the officers of the State of New York, and it will save the legislator of the State to do so:

SOME NEW LEGAL LIGHTS

At the last periodical examination held at the State University, of candidates for admission to the bar, twenty seven applicants were present and entered the examination.

Those who received certificates for license to practice, were:

D. L. Salisbury,	Kanawha County.
S. M. Sharp,	Pochahontas County.
U. B. Atkinson,	Kanawha County.
A. B. Koontz,	Nicholas County.
C. S. Hagen	Washington, D. C.
J. C. Berry,	Ohio County.
S. P. Richmond,	Kanawha County.
F. B. Shannon,	Wyoming County.
B. C. Shantz, ..	Cabell County.
J. N. Kenna,	Kanawha County.
W. G. McCorkle,	Kanawha County,
O. W. Richardson,	Mineral County.
C. E. Miller,	Marion County.
F. Van Camp,	Wetzel County.
L. P. Hager,	Lincoln County.

TWELVE SPORTSMEN GOOD AND TRUE.—A southern Mississippi man recently was tried on a charge of assault. The state brought into court, as the weapons used, a rail, an axe, a pair of tongs, a saw, and a rifle. The defendant's counsel exhibited as the other man's weapons, a scythe blade, a pitchfork, a pistol, and a hoe. The jury's verdict is said to have been: "Resolved, That we, the jury, would have given a dollar to have seen the fight."

The Constitutional Amendment for Increasing Judges

The Amendment to be voted on at the approaching election for increasing the Judges of the Supreme Court is a measure purely in the interest of expediting the business of that tribunal.

No other argument in favor of such a measure is needed than the condition of that business as disclosed by the clerk of that court, in the following letter:

"To the West Virginia Bar Association Committee on Constitutional Amendments:

GENTLEMEN:—In compliance with your request I have carefully examined the reports made by the Clerk of the Supreme Court from the years 1903 to 1910, inclusive, and the following is a statement of the number of appeals docketed, decided, dismissed, refused and pending, and the number of days that the Court was in session in each of the said years.

	1903	1904	1905	1906	1907	1908	1909	1910
Appeals docketed...	148	198	201	234	254	250	276	246
Appeals decided....	133	137	183	160	192	195	159	167
Appeals dismissed...	17	13	10	9	21	24	26	52
Appeals refused...	41	54	85	115	104	65	74	108
Appeals pending...	172	157	295	333	406	400	491	526
Days in session.....	200	205	261	223	239	225	223	242

This statement shows that there were pending on September 30, 1903, one hundred and seventy two cases, and on September 30, 1910, five hundred and twenty six cases. In addition to the statement made above, the records of my office show that there are now submitted for decision to the Court and undecided, three hundred and thirteen cases; of this number sixteen cases were submitted prior to the June term, 1909; twenty-three cases during the June term, 1909; during the June term, 1910, forty-eight cases. This will constitute the docket of 313 submitted cases when the Court meets October 11, for the Fall special decision term.

It will also be seen from the above statement that for the year ending September 30, 1910, the Court, or some member thereof, passed upon three hundred and fifty-four applications for appeals, or writs of error; of this number two hundred and

forty-six were granted and one hundred and eight refused. Each record and the brief accompanying same has to be read and examined by the Court or judges, before the question whether the appeal or writ of error should be granted or refused, can be decided. It will be observed that the applications for appeals for the last five years have averaged three hundred and fifty per year. It will be observed also, that the decisions rendered, and opinions filed, averaged about one hundred and seventy-five per year. For the years 1909 and 1910, the number of decisions rendered and opinions filed were slightly less than for the two preceding years; the cause of this was the character of some of the cases up for decision in those two years. As, for instance, the case known as the Two Cent Fare Case in 1910, and the well known King land cases in 1909. A case of this kind being one of great public interest and importance required a great deal of time for consideration.

It will further be seen that each judge wrote thirty-seven opinions in each of those years, and concurred in or dissented from one hundred and thirty eight opinions written by the other four judges. It will also be seen that if no further cases were brought before this Court it would take almost two years to decide all the cases now submitted if the court worked at the average rate for the last five years. The average record will be in size a book of one hundred and twenty pages: some of the records go above one thousand and the very large numbers run from one hundred and fifty pages to one thousand. There are usually filed with each case at least two briefs, and in at least half of the cases more than two. The average number of printed pages in the briefs will exceed forty. It will thus be seen that each judge must read at least one hundred and sixty printed pages of record and briefs in each case decided; to this must be added the reading of the many cases cited in the various briefs, and the independent research made by the judges into text books and cases; and of course time necessary for the preparation of his opinion after a decision is reached and the examination and discussion of such opinion in conference. Frequently very short records contain exceedingly troublesome and complicated questions requiring much time and research. Cases usually are not appealed unless they involve close questions.

The Court has original jurisdiction in mandamus, habeas corpus and prohibition cases. Since the statute made mandamus the proper remedy in election cases, many original cases have

been brought to the Supreme Court thereunder. These cases usually involve offices such as sheriff, clerk, etc., and are usually strongly contested, and are nearly always argued orally, and on account of the character of such cases they are usually given precedence. Otherwise the remedy would be practically valueless. It will be noticed that more appeals were dismissed in the last year than in any year preceding: several of these dismissals were because the parties could not wait for the decision. The indications point to a docket of at least one hundred and fifty matured cases for argument at the January term, 1911.

Respectfully Submitted,

WM. B. MATHEWS, Clerk Supreme Court of Appeals."

During a recitation of a class in psychology taught by Prof. William A. McKeever of the State Agricultural College, Manhattan, Kansas, three men suddenly dashed into the room, played a hold up and dashed out again. Then, before the 25 unprejudiced eyewitnesses had time to recover from the shock and exchange ideas, the professor made them describe what they had seen.

The first man of the trio of actors wore a hat and a long gray raincoat, a black mask over his nose and mouth, carried a small monkey wrench in his right hand and a salt bag full of nails in the left. Over one cheek was a streak of red paint. He pointed his wrench at his pursuers and called: "Stay back or I'll Shoot!" Then he ran across the room, fell on his knees, crying: "There it is, take it!" and ran out. Seven of the eyewitnesses described his suit—which could not have been seen without X-rays. Three said he wore a red mask. Some saw revolvers and clubs in his hands and one declared him bare-headed.

The second man, of medium height and unarmed, rushed in shouting: "Give it up you scoundrel!" He seized the bag dropped by the first actor and ran out last. Several of the eye witnesses declared that he snapped a revolver, or that he went out second, and one called him a "husky six footer."

The third actor to enter carried a revolver from which the cylinder had been removed. He cried: "Take it away from him Eddie!" and ran out second. Most of the eyewitnesses scarcely noticed him. Prof. McKeever was described as badly scared, even turning pale. The value of the result of the experiment is obvious. It proves you ought not to believe everything that honest people tell you.—*From an editorial in Colliers Weekly.*

Parkersburg, W. Va., October 3, 1910.

Dear Mr. Editor:

In response to your recent letter requesting my views upon the editorial contained in the last issue of THE BAR, entitled "A Practical and Safe Basis for Reform in the Courts," I beg to submit the following in the spirit of humility which lack of time for preparation should always engender. Your plan is for all of the Judges of the Circuit Courts, and one Judge of the Supreme Court, to be constituted a Commission by Act of the Legislature "to make, adopt, formulate and *put in practice* a set or Code of Rules of procedure, governing and making uniform the practice in all the courts;" the meeting annually of such Commission to change the rules as experience might suggest; the printing and binding thereof; recommendation to the Legislature of any needed change in any existing statute conflicting with any proposed rule; reservation by the Legislature of the right to modify, or abolish any rule of the Commission;; and finally making the rules adopted, binding on all the courts of the State in so far as not in conflict with any Statute.

In my judgment, the plan suggested, would not prove practical.

First; Because it is beyond the pale of human probability that ALL the Judges of the Circuit Courts could absent themselves from duties long enough to meet together and thoroughly consider the matters in hand. Much time would be required. Considering the various and sundry terms that the judges must hold at different periods during the year, and the pressing business frequently on hand during vacation, it seems impossible that even half of the judges could engage in the work. As to the Judge of the Supreme Court proposed to be drafted—considering the fact that that Court is hopelessly buried in the mass of cases that are daily being piled upon it—at least three hundred cases now pending—it could ill afford to spare one-fifth of its working force. I do hope the people of this State will be wise enough to vote for the Constitutional Amendment increasing the membership. We are placing more upon the

shoulders of these men than even such strong men as they are should be called upon to endure.)

Second: Attempts have been made in the past by agreement of judges, at meetings of the State Bar Association, to adopt "Rules of Procedure," and, in truth, rules of very limited scope were adopted, but they are as unstable as the sands of the sea; and I believe a comparison of the Rules actually observed in the different circuits would show a striking absence of uniformity.

One of the reasons why this has failed, has been because there is nothing to compel enforcement, which brings me to objection.

Third: Nothing but a binding law of the law-making power of this State will, I submit, ever afford anything but partial and ineffective relief. No decree of any Commission will be long observed. The majesty of the State, and the spirit of obedience to the law, must be invoked in order that the necessary radical changes in our procedure shall become accomplished facts.

The evils which you mention in your article, to-wit: "the delays, the excessive costs, and the circumlocution in our courts," are surely real—not imaginary. They are, generally speaking, the fault of the system, not the judges, though it is undoubtedly true that much depends upon the individuality of the judge presiding, who, even under our present cumbrous system, can do much to alleviate the evils. But what he can do in this regard is limited and the fact remains that the power to bring about "the delays, the excessive costs and the circumlocution in our courts," is by the law of the land a vested right in the litigant. He can, by the mere observance of rule day procedure, by ingenious motions, and proceedings and continuances obtained, and in chancery cases, the taking of irrelevant and voluminous depositions—all under the sanction of the law—drag along in the lower court for a year or more, a simple case which should be submitted for decision within at least three months after it is instituted; and then after the necessary delay of a

hearing in the higher court, he may, by the provisions of our law, be permitted to enjoy the same luxury again in the lower court, because of the breach of some rule of procedure, by the Circuit Court, made, perhaps, while the judge thereof had his mind concentrated on the merits of the case. The higher court may be able from the record to see that one of the parties on the merits of the case is clearly right; but in many cases it is forced by our LAWS to award a new trial or hearing, and send the cause back to the lower court, where the delays, excessive costs, and circumlocution will be duplicated.

But I must not digress. Any judge or lawyer could write pages to show the defects of our present procedure system. It often causes an absolute miscarriage of justice. The point I am making, is, that it is serious business. The remedy must, therefore, be drastic. The consideration of the same must be thorough. The enforcement of the remedy must be effective.

Now, while I think that this reform can be brought about only through the enactments of our Legislature, yet I fully agree with you that before the legislature should undertake the task, a Commission of those trained in the law, should give to the subject the deep and careful consideration which its importance deserves. If any judge should serve on such Commission, he should be relieved of his official duties while thus engaged, by a special judge, that he might devote his best energies to the work. But would not a Commission, the personnel of which could be recommended by the Bar Association, and appointed by the Governor, pursuant to law to be duly enacted, consisting of five persons—eminent lawyers and judges—be less unwieldy and more practical than the Commission of Judges suggested? And would it not be decidedly better to embody their recommendations as a part of our statutory law, rather than to attempt to give to any standing Commission—whether composed of all the judges, or of a few lawyers and judges—the power to make and change at will the important rules of procedure of our Courts? A power, the legality of which, I believe, would be open to question.

Very truly yours, Hunter H. Moss, Jr

REFORM IN COURT PROCEDURE

A Trencient and Convincing Review of the Situation

By JUDGE J. C. McWHORTER.

Editor the BAR:

Responding to your invitation to give my views touching the subject, "A Practical and Safe Basis for Reform in the Courts," on which an editorial appeared in the August-September number of THE BAR, I want to say that I heartily endorse your plan. I believe it to be a practical and common sense suggestion; and I believe also that the judges, under such an arrangement, would take pride in trying, as far as they could, to remedy the defects in our procedure and rules of practice, and that the bar of the State would willingly lend all proper encouragement.

About five years ago a number of the Circuit Judges got together and formulated a set of rules of practice to be adopted, as far as practicable, in the several circuits, that uniformity might be had in the rules of practice in all the circuits of the State. As hasty and superficial as the work was, it resulted in great good, and it is an earnest suggestive of what might be accomplished by a Commission of the Circuit judges, together with a Supreme Court judge, clothed by the legislature with proper authority, as you suggest.

But I do not think that the judges, under the power possessed by them as judges only, could, without the co-operation of the legislature, accomplish all that is required. Therefore, your suggestion that this Commission should recommend to the Legislature such bills as might be found requisite, points out one of its widest fields of labor and usefulness; and the Commission being non-partisan, little opposition would likely be met in the Legislature to the passage of meritorious meas-

ures recommended by the Commission.

The crying need of the hour is more celerity in the courts the business world demands it; the spirit of the times requires it; the civilization and enlightened conscience of the twentieth century insistently calls for it; and the common sense of the common people joins its voice in the universal clamor for it. Why can improved methods be so readily adopted in every other line of human activity, while our court procedure must drag along hindered by the barnacles of medieval methods, customs and practices? During the last hundred years we have possibly improved more in our methods of digging ditches than we have in our system of procedure.

In our practice too many ways are open for delaying the maturing and trials of causes. For instance, there is certainly too much time given for the filing of pleadings. Rules are held in the clerk's offices for the filing of pleadings and the making up of issues; but under our present loose laws and rules of practice, so far as expediting the maturing of causes is concerned, rule days mean but little. In equity it is almost impossible for the plaintiff, under section 53, chapter 125, code, as interpreted and applied by the Supreme Court of Appeals, and under our rules of practice, to secure a speedy hearing of his cause. The same is largely true of law cases. A defendant may ignore rule days and withhold his plea or answer until the next term after suit is brought, then, when the case is called for trial, and after he, by his inaction, has led the plaintiff to believe no defense would be made, and caused the plaintiff to rely thereon, the defendant's attorney may calmly draw from his pocket a demurrer, plea or answer, tender and have it filed as a matter of right, and force the plaintiff to continue a meritorious case which, if the pleading had been made up at rules, would then be tried. This is a daily practice in our courts, and the judge is powerless to prevent it under our present procedure. It will amaze anyone who pauses to reflect and to observe how much of the thought, time and energy of attorneys, that should be expediting the administration of justice, is de-

flected and applied to the procurement of continuances and other delays. If so many of the means of delay are not open to litigants, this time, thought and energy would be directed the other way.

Our rule days do not mean enough. Why should a plaintiff be permitted to bring a suit returnable to certain rules, implead the merits of the case is clearly right; but in many cases it is under the jurisdiction of the court, invoke the aid of the court for the redress of grievances, not only of himself but of others as well, then calmly sit down and use his own sweet pleasure about maturing the suit for hearing by withholding the filing of his bill or declaration for a period of three months? True, the defendant may appear on the second day of the process and give a rule for the plaintiff to file his pleading and by that means save one month, unless the plaintiff, by such procedure, permits himself to be unsuited, then later have the case reinstated, as the law provides, and thereby possibly secure an additional delay of six months. Why should he not be required to file his bill or declaration at the rules to which his process is made returnable, when the defendant is most certain to be present to give attention to his case under pain of his case standing dismissed at his cause without the right of reinstatement? And why should not the defendant be required, when personally served, to file his defensive pleadings at the next rules under pain of being shut out, except where he is prevented through fraud, accident, or unavoidable hindrances, like sickness, etc? And when a defendant files his demurrer at rules, he should be required to file therewith the certificate of his attorney to the effect that such attorney verily believes that there is merit and substance in the points raised by such demurrer: and he should also be required to file with such demurrer his own affidavit stating that the demurrer is not filed for purposes of delay. This is the practice in the Federal courts, and why should it not be adopted in our State courts? This causes.

These suggestions are, of course, radical—possibly too much so—but reform along these lines is unquestionably needed, and a Commission, such as you suggest, would certainly be conservative enough not to be too radical or revolutionary. I merely mention these as instances where improvement can be made. And really, when we look the matter squarely in the face, are not these provisions in the law for such delays in the filing of pleadings and maturing of causes only inducements to indolence and carelessness in attorneys in the practice of law? These provisions were made years ago when the business world was more indulgent and not so exacting, when lawyers were reputed to be gentlemen of leisure, and when their work and methods usually corresponded exactly with this reputation. Such methods are not practical, and do not accord with the spirit of the times, and do not meet the advanced, business like demands upon the legal profession. The moment a suit is instituted the law should clap a spur into the flanks of the plaintiff and his attorney to keep them moving; and it should likewise press a rowell into the sides of the defendant and his attorney, lest they, too, forget that the suits are brought for the redress of grievances and the adjudication of rights, rather than for a mere playing of hide and seek around the dark corners of a cumbersome and complicated procedure. Remove the corners, as far as possible, give the parties the open, and then tell them plainly to “move on.”

Then, again, our statute relating to the giving of instructions to juries is certainly obstructive. It is, in the forcible language of Mr. Molloy, “A pack of nonsense,” and seriously tends to hinder the administration of justice. It wrests from the court its proper prerogative of assisting juries to arrive at prompt and correct verdicts, and makes of the court a mere dumping box for the masses of stuff so often erroneously called “instructions,” so frequently prepared by attorneys only to entrap the court or confuse the juries. These instructions,

under the law, are thrown into the lap of the court like a parcel of junk, at the close of the trial, so that the court, while business is suspended for the purpose, is compelled to edit them necessarily under a sense of great pressure and haste. Of course this induces error and consequent delay. Under this statute the court is not even permitted to arrange the instructions in some logical order, but must read them to the jury in a certain order, however confused or confusing, and can not read them again unless requested to do so by the jury. This statute has about doubled the quantity of instructions asked for by attorneys in my circuit, because the defendant can, under it, have a long lot of instructions read to the jury as a last speech from the court, and the plaintiff, to offset this as much as possible, tries to have a still bigger batch of his instructions read to make a first impression on the jury. And so the evil grows to the annoyance of courts, the confusion and bewilderment of juries, and denial of justice to litigants; and I am informed that mine is not the only circuit that is suffering from this abuse.

Moreover, by this statute the court is precluded from giving to a jury any other instructions than those first read, no matter how necessary it may subsequently become to further aid the jury. I remember an important felony case in which the jury, after an all-day fruitless session, came in to the court and requested an instruction upon a point that had arisen in their minds and not fully covered, as they thought, by the instructions already given; but under this statute the court dared not render the jury such further assistance, and the jury hung, the defendant had to go back to jail for three months to await another trial, justice was baffled and delayed, and the good people whose Legislature enacted this law had to foot the useless bill. Only yesterday, in another important and instructive case, a hung jury was avoided only by both parties consenting that I might, at the request of the jury, further charge it orally which was done, and five minutes later a verdict was returned. It is not often such consent can be obtained, the defendant in criminal cases is only too often glad to get a hung jury.

I have named only two particulars in which reform is so badly needed, but there are numerous others. In fact, our whole system of procedure needs a complete overhauling. Just think of it! Practically one-third of all litigated cases are decided, not upon their merits, but upon technical rules of procedure. Collected in a bulk, possibly the decisions and discussion of our Supreme Court of Appeals based on procedure alone would fill twenty volumes of our reports; and the circuit judges, in deciding cases, are compelled to grope their way through this labyrinth of refined technicalities and hair splitting distinctions to ascertain whether they shall be permitted, in each case, to give to meritorious litigants that plain, simple, even-handed justice to which substantive law entitles them. The time and attention and thought of the judges must be devoted largely in almost every case, to trying to find these devious trails through the weedy marshes of technical procedure, instead of to the merits of the case. And this we call "administering justice!" Such a thing is an outrage upon the business and social interests of our great State, and a disgrace to our intelligent civilization

No wonder that a joint committee of the American Bar Association and of the National Civic Federation, at a recent meeting, declared that "The system under which law is administered in this country is a hundred years behind the age, and that the procedure in equity cases is a scandal to our jurisprudence!"

All such needed reforms could not, and, possibly, ought not, to be attempted at once, but should be gradually and cautiously made. If such a commission could be appointed, it should set about its work systematically with the ultimate aim of completely and thoroughly renovating our entire system of procedure. It ought not to be satisfied with mere scrappy patch-work. It would seem that we have enough of that now in chapter 125 of the code and the decisions of the Supreme

Court of Appeals based thereon.

May West Virginia be the pioneer in this movement.

J. C. McWhorter,

Buckhannon, West Va.,

September 23, 1910.

SERIOUS BLUNDER

Newport was aroused last month over a story that J. Pierpont Morgan told at a meeting at the Fishing club.

"They talk of the high cost of living," Mr. Morgan said. "but it's just as bad abroad. You all know what Trouville is like in the season.

"An American took in Trouville's *grande semaine* last year. When his bill was sent up he paused in his breakfast and studied it with a sarcastic smile. Then he sent for the hotel clerk.

"See here," he said, "you've made a mistake in this bill"

"Oh, no, monsieur, Oh, no!" cried the clerk.

"Yes you have," said the American, and with a sneer he pointed to the total. "I've got more money than that," he said."

AN ABSENT MINDED MAGISTRATE

Judge Gaynor related a little anecdote while lying at the hospital, after the dastardly attempt on his life, which proved that the Mayor was cognizant of certain evils and not at all adverse to giving them publicity.

"I knew a man over my way," said the Judge with a smile, "who had formerly been a bartender. Going into politics he was elected police justice. With some dread he heard his first case. Mary McMannig was up before him for drunkenness. The ex-bartender looked at her for a moment, and then said, sternly:—

"Well, what are you here for?"

"If you please, your honor," said Mary. "the copper beyant pulled me in, sayin' I was drunk. An' I don't drink, yer Honor; I don't drink.

"All right," said the justice, absent-mindedly, "all right; have a cigar."

We put hobbles on a horse to keep him at home, but the hobble skirt is not intended for any such purpose.

THE PROFESSION OF LAW AND MEDICINE
Versus
THE BUSINESS OF LAW AND MEDICINE

The sympathy of the great mass of men is fairly sure to go out almost spontaneously to the individuals in whose path artificial restrictions are set up. It has been the boast of our democracy that America was the land of equal opportunity to all, and the sentiment finds response in the breast of every right thinking man.

It is doubtless out of this feeling that the opposition to the erection of reasonable standards of entrance to the learned professions has arisen. Like many popular sentiments which are fundamentally right, the transformation of the sentiment into practice has been made in a short-sighted way. It has operated to give the ill-prepared and unfit member of society an advantage at the expense of the community. No man is born with the right to enter one of these professions any more than he is born with the right of suffrage. Both rights are conferred by the sovereign people, upon prescribed conditions. The difficulty is that it is always more easy to excite popular sympathy for the individual complainant, however unworthy, than for the sovereign people, which seldom complains, no matter how far its interests are invaded. The notion that any man who wants to practice medicine ought to be allowed to try, and that any preacher who thinks he has a call ought to preach regardless of training, belongs to the pioneer stage of civilization.

By long usage of civilized nations the professions of law and of medicine have received certain recognized standing. The practice of these professions carries with it certain privileges and advantages and should carry certain responsibilities. To require that those who are authorized to practice these professions should comply with reasonable conditions of preparation is not only a duty to the state, but is absolutely just to the individual. The difficulty has come in determining what are reasonable requirements for preparation in the practice of law and medicine, requirements that shall protect the interests of the public and still not inflict undue hardship upon the individual. It is in the settlement of this question that the practical difficulties arise. Great pressure is brought by those who desire to enter those professions to make the standards of admission as low as possible and wherever the effort is made to constitute such standards as will safeguard the public and

preserve the character of the profession, the cry is set up that the poor and struggling candidate for a profession is discriminated against. This argument is always illustrated by the example of a few great men who have achieved success in one or the other of the professions without the advantage of a formal education. The argument is fallacious and is generally dishonestly made.

What are reasonable conditions to require of candidates for these professions? Manifestly it would be an unfair discrimination against the candidate for medical practice to require him to belong to a certain medical sect or to graduate from a given school, but it is equally manifest that it is not only fair but absolutely essential that he should be grounded in anatomy and physiology and kindred fundamental sciences upon which all practice of medicine rests. It is conceivable that a man might get this knowledge and this practice in some other way than by the aid of the medical school and the hospital, and if he could show his knowledge and his skill by a competent examination he should be allowed to do so. Such cases, however, must be very rare. The candidate who is seeking to enter the profession by some other path than the hard and exacting path of a good medical school and hospital is in nearly every case seeking to get his knowledge by practicing on the public and being paid for learning. Similarly the candidate for the profession of law ought to have something more than a superficial knowledge of the practice of the courts of his community. He should at least have some knowledge of the history of jurisprudence, of the underlying principles of law of legal processes, some conception of the administration of justice, some study of the relations of equity to technique. Plainly, the least that can be required of a candidate for these professions is a fair grounding in the fundamental science of our day and a measure of participation in the actual application of that science in the practice. Most intelligent men will concede so much, but are not always ready to admit the further requirement that the candidate in law or in medicine must also present the evidence of a good general education, such, for example, as can be gained by a college course of not less than two year's duration. That this condition is essential to the maintainance of the character of the profession and that it forms the only effective means of sifting out the worthy from the unworthy, the fit from the unfit, is the conviction of those who have given the matter most thought.

Without exception the professional schools of low grade, poor courses, and sham examinations are those which admit students without the preparation of a general education.

Not only is the requirement of a good general education justified on the practical ground that thus only can capable men be commonly obtained, but it is absolutely essential in the maintenance of the professions themselves. To become a good lawyer or physician, it is not enough to know the mere technique of practice. Such a man should also be a student of his race and of its history, with sympathies fully developed by a contact with life and with books. The reason for this and the justification for its requirement lie in the fact that these callings are professions, and such qualities are necessary in the members of a profession. This distinction is fundamental and one which in late years we have been as a nation disposed to forget.

Aside from all question of intellectual basis or content, the distinction between a business and a profession does not lie in any difference of honor in the pursuit of one or another, but in the obligations which one assumes. However honorable a business calling may be, the man who enters it makes no pretence of any other intention than the honest pursuit of his own gain. He who enters a profession likewise does so for his own advantage, but he also undertakes certain obligations to the calling itself and to the public. He is under obligation to consider the interest of the public as well as his own, and this is one reason why these great callings are differentiated into professions—because those who practice them accept the obligation of the calling. Bacon has expressed the idea in the introduction to *The Maxims of the Law* in the phrase, "I hold every man a debtor to his profession." It is the acknowledgment of this debt and the effort to pay it which differentiate a profession from a business. That debt devolves upon him who enters one of these great professions the obligation to fit himself for it, the obligation to conserve the honor and advance the cause of his profession, and above all to remember in his practice his duty to the state as well as to himself. It is only through the observance of these ideals that a profession can remain a profession.

Those who have studied the tendencies of this nation since the close of our civil war have had reason to feel alarm over the diminishing respect for law. As a people we regard the law lightly, and our habits in this matter are growing worse

rather than better. Many factors have conjoined to bring about this state of affairs, but one of the most important lies at the door of those who profess the law. Legal process in our nation is slow and costly. Justice is hard to get. The great mass of the people believe, with greater or less reason, that in reaching decisions, legal technicalities obscure equity. The evolution of legal process has resembled that of our national game of baseball which has become a pitcher's game. The administration of law presents to the general public more and more the spectacle of a game in which the expert high-priced attorney outplays judge and jury. Lawyers of the highest eminence and of irreproachable private life have served interests which were plainly against the public policy and in violation of the interests of the public. There has seemed to be no limit beyond which a lawyer might not go in the service of a client who employed him to circumvent, not to uphold, the law. Such men have been unmindful of the debt to their profession; they are in the business of law, not the profession of law. The ideals of the professions have been lowered by the great mass of men who have taken up law as a business.

The profession of medicine in our country has suffered in a similar way. Any one familiar with the medical practice of such a country as Germany, for example, must have been struck by the difference in attitude of the German and of the American physician to his profession. A large proportion of German practitioners devote part of their time to research. They decline to give up their whole time to paid practice.

They accept the ideal that a man must better his profession. The number of American physicians who take this position is small, indeed, and they are likely to be looked down upon by their colleagues. The great mass of American physicians, however skillful in the practice, are in the business of medicine.

The low terms of admission to great callings are greatly responsible for these conditions. So long as the door stands open to the poorly educated, the ill-prepared, and the morally weak candidates, so long will the calling be pulled down beneath the level of a true profession. There is no way in which the public can assure itself that every man who enters either of these professions ought to do so. But it can at least exclude the manifestly unfit by the just requirement of a fair general education and a proof of the fundamental sciences upon which the profession rests. Thus both public interest and the integrity of the professions may be conserved. The question whether

law is to be a business or a profession is a critical one in determining the stability of popular government.

THE ELEVENTH AMENDMENT

The Address delivered by William D. Guthrie, Esq., before the New York State Bar Association at its recent annual meeting on "The Eleventh Article of Amendment to the Constitution of the United States" is characterized by wide and accurate scholarship, as well as much valuable original suggestion. He sketches the history of the Eleventh Amendment, which was immediately inspired by the decision in the *Chisholm v. Georgia* (2 Dall., 419) wherein the Supreme Court of the United States construed the Constitution so as to assume jurisdiction of a suit in assumpsit by a citizen of South Carolina against the State of Georgia. The author shows that the peculiar ruling of the Eleventh amendment, that "the judiciary power of the United States shall not be construed to extend to any suit * * * against one of the United States by a citizen of another state or by citizens or subjects of any foreign state," as having been "used for political reasons and out of concession to the susceptibilities of the advocates of State rights. Extremists want a declaration that would not only overrule the recent construction of the Constitution by the Supreme Court and deny that such a power had ever existed, but would also oust all jurisdiction in pending as well as future cases. The amendment, therefore, does not purport to alter or amend the constitution, but to maintain it unchanged, while controlling its scope and effect by authoritatively declaring how it shall not be construed."

Following the course of decisions under this Amendment, Mr. Guthrie discusses Chief Justice Marshall's opinion in *Osborn v. Bank of the United States* (9 Wheat., 738) which laid down the principle "that, notwithstanding the Eleventh Amendment, a Circuit Court of the United States had jurisdiction in equity to restrain a State officer from executing or enforcing an unconstitutional State statute when to execute it would violate rights and privileges of a complainant guaranteed by the Constitution of the United States, and work irreparable damage and injury to him, for which no plain, adequate or complete remedy could be had by law."

Although the general doctrine of the *Osborn* case has never been departed from—indeed, has never been more actively operative than during the past two years—the position there-

in taken, that the Eleventh Amendment restraining the jurisdiction granted by the Constitution over suits against States is limited to those suits in which a state is a party or the record has been modified. The Supreme Court declared, in a proceeding entitled *In re Ayrs* (123 U. S., 443, 487), that "it must be regarded as a settled doctrine of this court, established by its recent decisions, that the question whether a suit is within the prohibition of the Eleventh Amendment is not always to be determined by reference to the nominal parties on the record." Mr. Guthrie argues that the Federal courts would have been saved from much faltering and uncertainty if Chief Justice Marshall's original ground has been adhered to. The language of the paper on this point certainly merits very careful consideration:

"It may, nevertheless, be interesting to re-examine the doctrine enunciated by Chief Justice Miller and to inquire whether after all, it does not embody the true and sound rule which should govern this question, particularly in view of the fact that the cases that have departed from its reasoning have failed to indicate any definite criterion to guide us in determining when a suit against a State officer is or is not to be deemed a suit against the state within the true meaning of the Eleventh Amendment. The question should be considered as if the jurisdiction of the Federal courts had never been extended to suits by an individual against a State. The controlling inquiry in a suit against a State officer ought logically to be whether the relief or remedy sought can be granted in the absence of the State as a party defendant; in other words, whether it is or is not a necessary and indispensable party, to be determined by the result or burden of the judgment which may be entered. If, for example, the suit is to enjoin the enforcement of an unconstitutional statute regulating rates or imposing taxes, it must be presumed that the state has not authorized the wrong, that it can have no legal interest or concern in a void enactment of its Legislature, and that it can not be heard to assert any right to have its officers violate the Constitution of the United States for its benefit. If, on the other hand, the relief or remedy sought will effect the property rights or funds of the State, or compel it to pay its debts, or require the specific performance or a contract by the State, or by the doing or omitting to do any act by the State, the court must needs hold that it is a necessary and indispensable party, and that, as it cannot be sued in a Federal court for want of jurisdiction

over it, the case must be dismissed. This dismissal, however, would not be for want of jurisdiction or judicial power over the individual State officer as defendant, nor because the suit was against the State—for the State was not a party and its presence was sought to be dispensed with—but because the State was an indispensable party defendant and the case could not proceed in its absence. The result of recurring to this view would be to simplify the consideration in many cases and reconcile much conflicting reasoning. We would then have a definite and logical criterion to guide us in cases against State officers. If the court found that the State was not a necessary and indispensable party the issue in such cases would be narrowed to the inquiry whether the relief should be granted within established principles of equity jurisprudence and procedure.

THE BEST HE COULD DO

Up in Minnesota Mr. Olsen had a cow killed by a railroad train. In due season the claim agent for the railroad called.

"We understand, of course, that the deceased was a very docile and valuable animal," said the claim agent in his most persuasive claim-agent-ly manner, "and we sympathize with you and your family in your loss. But, Mr. Olsen, you must remember this: your cow had no business being upon our tracks. Those tracks are our own private property and when she invaded them she became a trespasser. Technically speaking, you, as her owner, became a trespasser also. But we have no desire to carry the matter into court, and possibly give you trouble. Now, then, what would you regard as a fair settlement between you and the railroad company?"

"Vall," said Mr. Olsen slowly. "Ay bane poor Swede farmer, but Ay give you two dollars." — *Everybody's*. L

"This magazine looks rather the worse for wear."

"Yes: it's the one I sometimes lend to the servant on Sundays."

"Doesn't she get tired of reading always the same one?"

"Oh, no. You see, it's the same book, but it's always a different servant!" — Tit-Bits

Madge—But, Billy, the idea of three coaches to each man to put him in condition for the big game! Why, it's absurd!

Billy—Not any more so than three dressmakers, two maids, a hair dresser and half a hundred female relatives putting you in shape for commencement—Puck.

CHANGE FOR THE BETTER

Political observers in New York are commenting on the fact that this campaign is the quietest in many years despite the heat of the controversy. Nor is it, we believe, due to public apathy, but rather to the fact that the day of red fire, torchlight parades, uniformed marching clubs, banners, bands and buttons, as well as street corner spellbinding and cart tail oratory is a thing of the past. In all New York there are not half a dozen campaign banners this year, no American flags are used for campaign advertising and the man wearing the button of a candidate is a rarity. Even the lithographs of the candidates are few and far between.

The explanation can be found in the growth of independent voting throughout the country. The day of unthinking enthusiasm for a party, rather than deliberate judgment on men and principles, has accompanied the old emotional campaign into the limbo of oblivion. The voters are becoming more and more difficult to stampede by red fire, real, oratorical, or otherwise. They are no longer to be led around by an appeal to the emotional or hysterical.

FILLING HIM UP—"You have many feuds in this country?"

"And what becomes of a feud when the last of the family is wiped out?"

"Oh, the executor generally takes it up. Or, if he's a poor shot, we have trust companies which will carry it on."—Louisville Courier Journal.

ONCE WAS ENOUGH.—Magistrate (discharging prisoner)—"Now, then, I would advise you to keep away from bad company."

Prisoner (feelingly)—"Thank you, sir. You wont see me here again."—Lippincott's

Wiseacres advise us that there is always room at the top, and the average man when he comes to fifty is apt to find that there is room at the top for more hair than he has.

Farmer—"Waal, it happened like this: My wife was throwin' a stone at the hens, and some way the deer, which was feeding round back of the barn, got hit."—Boston Herald.

CRITICISING THE JUDICIARY

A Very Readable Lecture by Judge K. M. Landis before the Wisconsin Law College

In compliance with Judge Jenkins' invitation to address you on a subject related to law, I have decided to submit a few observations respecting the criticisms of courts. The question whether judicial proceedings constitute a legitimate subject of public criticism has been much agitated in this country, and the proposition does not enjoy the distinction of having been carried beyond the realm of controversy by universal acquiescence in either the negative or affirmative view. So far as I have observed, the reason usually expressed in support of the contention that people should not condemn the judgment of a court that it will serve to disturb public confidence in the administration of justice. Whether this reason always exhibits *the real motive* behind the protest, or whether it is a high patriotic stand dictated by a fear that investigation, discussion, and criticism may create public interest in the particular matter involved in the litigation as may result in legislation calculated to disturb some selfish interest, is not my purpose here to inquire. I shall consider the subject solely with the view to the ascertainment of whether public confidence in our judicial system will be strengthened or weakened by having it understood that the work of judges is beyond the domain of public criticism. And by "the public" I mean the great mass of people of the United States who are engaged in legitimate occupations and whose only use for law is the protection of right and the prevention of wrong.

Of course, it is essential to the salvation of any society that the people have respect for its judicial system. To strengthen or inspire this respect where confidence is weak or lacking should be the first concern of every officer of every court both on the bench and at the bar, for let it be remembered that the highest privilege of the profession is not the winning of cases, or achieving distinction for receiving great fees. The practitioner who contents himself with this species of remuneration sordidly dwarfs his whole character, and puts aside the splendid compensation that is the reward of discharging the higher obligation that goes with his license—the duty of seeing to it that year by year justice becomes more secure, in order that all men may be protected in the legitimate enjoyment of life,

liberty and property. Whether up to this time, this obligation has been fully discharged by the legal profession has been at times the subject of debate, in which it is not my purpose to participate tonight.

For my own part, I have never been able to acquiesce in the doctrine that there is, or can be, an impropriety in the investigation of anything done by any public officer in the exercise of public power. In this country we do not believe that the king can do no wrong. Our whole theory is a protest against this dogma. The conduct of executive and legislative officers is approved or condemned at the succeeding election. The elective method of choosing judicial officers in most of the states also affords a means of expressing the public judgment on the methods pursued by judges, while under the federal system there is provision for the process of impeachment as a way of getting rid of a judge who has debauched his office. This control which the people of the several states and of the country have thus retained over the instrumentalities of government tends to remind us who is sovereign, and clearly indicates the judgment of that sovereign that no part of the public authority may be safely quit-claimed to any man or set of men. This may be borne in mind in considering whether you strengthen your neighbor's confidence in the judicial system when you tell him he must not criticise a court's decree. For he knows that the court was set up and is maintained by him and the other citizens of the community for the administration of that system of law with those citizens, acting through their representatives, have established. He knows that courts are presided over by judges who are recruited from the legal profession, and that the members of that profession are moulded from common clay, that they are endowed or afflicted, in fair proportion, with those elements of strength and weakness that are common to human beings in all vocations. He sees a great mass of law designed to control the conduct of men—a penal code of great proportions making provisions for the prevention of crime and the punishment of criminals—all conceived on the theory that there will be some men in all classes and conditions and occupations that will go wrong. He may not be aware of anything in preparation for the bar, or the practice of law, or the exercise of judicial power, calculated to unmake the man, resolve him into his constituent elements, and re-assemble those elements that are good, leaving out those that are bad. He has probably heard that all judges do not always agree—that some

courts reverse other courts, and that the reversing courts are reversed by still other courts, which in turn sometimes reverse themselves; that the judges of one court are not always of one mind, the members sometimes coming to diametrically opposite conclusions upon the same state of facts--and then, should your neighbor remember that he is conclusively presumed to know the law, that is to say, to know in advance what the court of last resort will ultimately decide the legislature meant by the language used, are you going to strengthen his respect for the judiciary by telling him he must make no adverse comment on the court's decision? Will he not be forced to become suspicious of a thing into which he is not at liberty to inquire, for what availeth it the citizen to investigate if, after investigation, he may not express the conclusion reached by the uncontrollable processes of his brain?

We must not ignore the consideration that the judgment which is at all likely to become the subject of criticism is rendered after a controversy as to matter of fact or principle of law, or both, as is usually the case. We must also remember that the finding of fact follows the giving of testimony by witnesses who contradict each other, and that the court's conclusion of law is reached after lawyers representing each side advocate and argue for a determination, one at least of which is contrary to the court's decision; that in making its finding of fact the court is frequently required to disbelieve the statements of witnesses who may be esteemed to be honest men by the citizen giving consideration to the proceeding, and that the legal proposition laid down and applied is one as to which not only laymen may be at variance, but prior decisions of other courts in conflict. Indeed, we all know that it is a matter of almost daily occurrence that in the opinions of reviewing courts it is recorded that the authorities are not in harmony, or the weight of authority is one way but the better reason is considered by the court to be the other way. Situations such as this can hardly fail to make the layman realize that after all the conclusion of the court is only a human judgment, and is there not some excuse for his desire to voice his criticism, at least when he recalls the adverse decisions of other courts?

A fair consideration of this question requires that we should have in mind the very great power which our courts exercise. They are authorized to determine not only controversies between individuals involving dollars and cents, nor cases where someone's life or liberty is at stake, but it is their

function to set aside a statute enacted by the people's representative when, in the court's judgment, that statute is in conflict with the fundamental law as laid down in the written constitution of government. In the exercise of this last mentioned authority the court's act is highly political, using that word in its broad sense. And it not infrequently happens that the judgment pronounced nullifies a law whose enactment was followed by a bitter contest between political parties at times involving a moral principle. Such was the case of *Dred Scott*. At that time there were those who believed that the court's ruling on the point actually in controversy was wrong, but intelligent, honest men (I do not say they were right or wrong) were profoundly convinced that the judgment undertook to go beyond the litigation in hand and to settle a proposition of partisan politics then the subject of heated conflict throughout the United States. This decision was attacked, and those in whose interest the court's decision went insisted that the court's ruling should not be criticized, as they had previously insisted slavery should not be discussed. The reason they gave why the people should keep still was that criticism of the court would breed disrespect for the court. Not long after this decision was rendered Abraham Lincoln, then a candidate for the Senate against Douglas, made a speech at Springfield in which he expressed his views as follows on this subject:

"And now as to the *Dred Scott* decision. That decision declares two propositions—first, that a negro cannot sue in the United States courts; and secondly, that Congress cannot prohibit slavery in the territories. It was made by a divided court—dividing differently on the different points. Judge Douglas does not discuss the merits of the decision, and in that respect I shall follow his example, believing I could no more improve on McLean and Curtis than he could on Taney.

"He denounces all who question the correctness of that decision as offering violent resistance to it. But who resists it? Who has, in spite of the decision, declared *Dred Scott* free, and resisted the authority of his master over him?

"We believe as much as Judge Douglas (perhaps more) in obedience to and respect for the judicial department of government. We think its decisions on constitutional questions, when fully settled, should control not only the particular case decided, but the general policy of the country, subject to be disturbed only by amendments of the constitution, as provided in the instrument itself. More than this would be revolution.

Such situations have arisen more than once in the history of the country, and it has very naturally resulted that those who have won at the polls and lost in court busy themselves in an endeavor to evolve a plan that will put in the form of law the principle or proposition which has been defeated in the legal proceeding. In such a situation I suppose no one will assert that it is the duty of good citizenship to abandon the principle intended to be expressed in the law, for, leaving out of consideration the ultimate power to accomplish the result by amending the Constitution, it may be that in the enactment of a new statute the objectionable features may be eliminated and the popular will given effect. This being true, of course, it is entirely consistent with good citizenship to abandon the principle intended to be expressed in the law, with a view to the drafting of a satisfactory new law which the court will uphold. And this can hardly be done without paying some heed to the judicial doctrines as to how or why the constitution forbade the former enactment. Now it is true, although they do not realize it, that the men are still Hamiltonians and Jeffersonians. Their views of the power of the general government and of the rights and prerogatives of the state governments clash today just as they did in the early days of the republic. On this subject the opinions of men amount to a profound conviction, and when a statute is abrogated as unconstitutional by a court composed of men who are also Hamiltonians and Jeffersonians, and the subject is up to the devising of a new law, if possible, that will live through the court, is it not just a trifle too far to ask the Jeffersonian citizen to refrain from commenting on the ruling of the Hamiltonian Judge? Involved in such a situation is the whole theory of our government, as to which men of equal honesty and intelligence are diametrically opposed, and the interest aroused is no less intense today than was the case when, more than a hundred years ago, the framers of the constitution set about their great task of constructing a free government. In such circumstances, what is more natural than that even the most patriotic man may find impossible to refrain from giving expression to his solemn conviction that the court is wrong? Moreover he knows that judges have changed their minds and have reversed themselves, that it has even happened that governmental policy once judicially forbidden has subsequently been judicially sanctioned. Furthermore, it is his government with all of its instrumentalities his agencies to carry out his will. The constitution itself,

which authorized the Congress to meet and the court to sit, is his constitution, if not made yet allowed to stand with all of its grant of power. The Congress that passed the law was his Congress, chosen by him. The court that abrogated the law was composed by judges appointed by a President elected by him for that purpose, among others. If he was right as he might be, in asking Congress to pass the law, in the exercise of its power to that end, and the court was wrong, as it might be, in adjudging him wrong in that regard, what duty of good citizenship is violated by a discussion of the question? And is it not better that there be a general understanding of the whole situation, such as can come only from full and frank debate of the point involved, than that there should be sullen acquiescence in any act by any man or body of men in the exercise of official power? If the citizen is wrong and the court is right, can there be any question that after such discussion the intelligence of the people will enable them to ultimately appreciate that fact and if the judgment is wrong, can any permanent good possibly come affecting a belief in its wisdom and justice? Is it not better to have the error generally and frankly recognized for avoidance in the future; in other words to have the truth known? Can any thing be more infinitely absurd than that you can breed respect for a thing by putting it beyond a man's right to inquire.

Adverse criticism—denunciation that is unjust can permanently injure nothing or nobody. And as a rule its impotency increases with its bitterness. But very great injury can be done even a virtuous cause by an attempt to forbid inquiry into it or comment upon it. May we not learn something from the world of sports which, in one department or another, includes nearly every American citizen. I have been going to baseball games for thirty years—I never saw a game or heard of one where somebody did not call the umpire a robber or a thief and yet no intelligent man doubts the integrity of organized baseball.

In conclusion, I feel like congratulating the members of this school. Your lives are before you, and your professional occupation will give you great opportunity for doing good in the world. You will come to the bar when there will be more wide spread intelligence and a higher standard of morality than ever before. True merit becomes more self reliant with each succeeding day. Your most useful service will be rendered not to the individual client, but to society at large, which has

a right to expect that you will use your technical knowledge to make the administration of justice more nearly a science, and therefore the better entitled to public confidence. Do what you can to put a stop to the interminable delay in court that so many times means a denial of justice. See to it that no man loses the right to appeal to a reviewing court merely because he is without money to pay the cost. To my mind, this feature of the present situation is utterly frightful. Do your share. And remember always that anything that is entitled to public confidence will have it; that honest, intelligent service on the bench, as in any other sphere, will be accorded the full measure of merited respect; that no official act of any public functionary is or ought to be above investigation, and that no wrong on this earth is too sacred to be condemned.

SHE COULDN'T KICK

Mrs. Bertha Lang, 19 years old, of 19 Sackman street, Brooklyn, had Miss Frances Shultz or 89 Sackman street in the New Jersey Avenue police court on the charge of having attacked her in the street. She said that Miss Shultz kicked her. Miss Shultz said that she couldn't have kicked the complainant, for at the time of the alleged attack she was wearing a hobble skirt, which she had brought to court, that was only fourteen inches in diameter at the hobble band. Magistrate Gilroy dismissed the complainant.

The licensing of the saloon is purely a caste measure. It is the poor man, the hard working, laboring man, and mechanic that supports the saloon and keeps it alive. The drinking man who is in better circumstances has his own saloon in his cellar, and it does the same for him as the plain saloon does for his poorer neighbor. Nobody need envy the rich man with his wine and beer cellar. The fearful curse of it all is only too soon apparent. He, too, is likely to end life as a very poor man. The legalized saloon is the set foe of the sor. of toil, and is usually the means of his undoing. When the saloons are closed forever it will be a great day in the history of the toiling men of America.

Be thankful every day: don't pile all your gratitude on to one day. The man who is thankful only when the governor says he must, never is very thankful any day.

West Virginia Court of Appeals

Decisions Handed Down at the Last Term

REPORTED ESPECIALLY FOR THE BAR

Appearing Here for the First Time in Print

STATE v. NICHOLS.
Cabell County. Affirmed.
Williams, Judge

SYLLABUS.

1. An unlawful sale of intoxicating liquors made by the agent, or bartender, of a licensed saloon-keeper at his place of business, is a sale by both, and the saloon-keeper, as well as his agent, is liable.

2. In such cases the saloon-keeper can not escape liabilities on the ground that his agent made the unlawful sale without his knowledge and in violation of his express instructions. The unlawful sale constitutes the offense, and the seller's motive is immaterial.

3. If a licensed saloon-keeper, or his agent, deliver intoxicating liquor to a minor and receive from him the money therefor under the belief, however induced, that the minor is agent for another whose identity is unknown and is not disclosed, it constitutes a sale to the minor.

PORTER v. MARSHALL, ET AL.
Hancock County. Affirmed
Miller, Judge.

SYLLABUS.

On a motion under section 5, Ch. 132, Code 1906, to appoint a new trustee in a deed of trust, in place of one removed beyond the limits of the state, the statute of limitations, or presumption of payment after twenty years, can not be interposed as a defense: such questions being proper subjects for adjudication only in suits, in a court having jurisdiction of the subject matter and of the parties upon proper pleadings and proofs filed.

STATE v. PISCIONERY ET ALS.
Marion County. Affirmed.
Robinson, President,
SYLLABUS.

1. If different counts in a felony indictment charge separate and distinct offenses, and are inserted therein for the purpose of meeting the varying phases of evidence relative to the same criminal transaction, the prosecuting attorney will not be required to elect as to the count on which he will proceed to trial.

2. Where one offended against waives none of his rights, and the offender alone is responsible for the criminal intent, the nature or quality of the offense will not be affected by the fact that the party offended against connived at the offense or assisted the offender for the purpose of entrapping and convicting him of the crime.

3. The so-called Red Men's Act, being Code 1906, Ch. 146, Secs. 9 and 10, contemplates a taking of property by force or threats and against the owner's consent, in pursuance of a conspiracy for the purpose, and applies to any taking of that character.

4. The verdict of a jury deduced from conflicting evidence and involving judgment as to the credibility of witnesses only will not be disturbed upon writ of error on the ground that it is contrary to the evidence.

KELLEY & MOYERS v. Bowman, CLERK.
Mercer County. Mandamus Awarded.
Brannon, Judge.
SYLLABUS.

1. Where the words of a statute are plain, free of ambiguity, conveying a plain intent, there is no room for construction by a court but only for obedience to the legislative will.

2. A clearly expressed intent by plain words in one part of a statute cannot be defeated by mere implication from a doubtful clause in another part.

3. If a subsequent clause in a statute is obscure, it will not control a previous clear clause.

4. When one section or clause of a statute treats specially and solely of a particular matter that section or clause referring to such matter does so only incidentally.

5. Under its charter act, ch. 1, Acts 1909, the Board of Affairs of the city of Bluefield has power to grant license to sell spirituous liquors without the consent of the County Court of Mercer County.

6. After a grant of license to sell spirituous liquors by the Board of Affairs of the city of Bluefield, it is the ministerial duty of the county clerk to give to the licensee the certificate to perfect the license provided for by Code 1906, ch. 32, sc. 16.

STATE v. CALHOUN
McDowell County. Judgment Affirmed.
Miller, Judge.
SYLLABUS.

1. An indictment charging that defendant did unlawfully sell, offer and expose for sale, wine, porter, ale, beer and drinks of like nature, not then having a state license therefor, is good under the statute and not bad because of duplicity.

2. Duplicity is not available on a motion in arrest of judgment.

3. A motion to strike out all the evidence of a particular witness or the whole of the evidence of one party, should not prevail, although it may contain some illegal or incompetent evidence, if it also contain other evidence proper to go to the jury. The motion in such case should be applied to the particular evidence regarded illegal and incompetent.

4. On the trial of one indicted for selling illegally, intoxicating liquors, until required by motion of defendant to elect which sale it will rely on for conviction, the State may prove and rely on any sale made within one year next prior to the finding of the indictment.

5. Though there be error in instructions given on behalf of the prevailing party, yet the judgment will not for this reason be reversed if it appears that the same error was introduced into the record by instructions given at the instance of or was invited by the other party.

6. On the trial of one indicted for selling illegally intoxicating liquors without a state license therefor, proof of a charter of incorporation issued to defendant and others for a social club, as provided by Ch. 32 section 120-a, Code Sup 1907, it being also proven that defendant made or authorized such sales, or was concerned therein, will constitute no defense. To constitute good defense there must be proof also of regular organization under such charter, assessment and payment of the license taxes assessed, as prescribed by said section, and that the sales proven to have been made, were limited to regular members of such club.

Williams, Judge, absent. Counsel below.
WILKES v. BIERNE ET AL.
Greenbrier County. Affirmed.
Robinson, President.

In a contract to support and maintain one for the remainder of his life, fixing a sum to be paid in case of breach and denominating it a "penal sum," the amount cannot be construed to be liquidated damages, when there is nothing in the nature of the case and the tenor of the agreement indicating that the parties themselves fairly estimated and adjusted the damages at the time of making the contract.

CASTLE ET ALS v. CASTLE ET ALS
Preston County. Modified and Affirmed.
Williams, Judge
SYLLABUS.

1. The trial court has discretion in the matter of consolidating causes, and, to warrant a reversal of a decree on this ground, it must appear that such discretion has been misused to the prejudice of the party complaining.

2. It is error to decree costs in favor of one of the parties to a suit against another, in face of a binding agreement between them that the suit should be dismissed without costs.

3. An appeal will lie to this court for such an error as to costs which have been made the subject of agreement, provided the amount thereof exceeds one hundred dollars.

4. If the amount of the costs, thus erroneously decreed, does not appear, or if it does appear and is less than one hundred dollars, this court will, nevertheless, correct the decree in this respect, provided other errors have been assigned which gave this court jurisdiction of the appeal; and, if no other error appear, the decree will then be affirmed with costs in this court in favor of appellee.

SLATER v. WILLIAMSBURG CITY FIRE INS. CO.
Mingo County. Judgment Reversed, Demurrer Sustained and Judgment for Defendant.
Poffenbarger, Judge
SYLLABUS.

An adjuster of an insurance company has no authority or power, as such, to waive proof of loss, required by the policy, as a condition precedent to a right to action, by denying liabilities on the part of the insurer upon other grounds, when the policy contains the clause, limiting the authority of agents, found in the standard insurance policy.

KELLEY & MOYERS v. COUNTY COURT.
Mercer County. Mandamus Refused.
Erannon, Judge.
SYLLABUS.

Under the charter of the city of Bluefield (Acts 1909, Ch. 1) the County Court of Mercer county has no jurisdiction over the subject of license to sell spirituous liquors in that city, or within two miles of its limits. Therefore, after such license has been granted by the board of affairs of said city mandamus does not lie to compel the county court to issue a certificate of the grant of license.

STATE v. WOODWARD.
Randolph County, Judgment Affirmed.
Brannon, Judge.

SYLLABUS.

1. Sections 1 and 3 of Chapter 14, Acts Extra Session of 1909, closing saloons on Sunday, are not unconstitutional as imposing punishment cruel or unusual or disproportionate to the offence, or depriving of property without due process.

2. The Legislature has power to create and define crimes and fix their punishment, so only that such punishment is not cruel or unusual or disproportionate to the offence.

3. The Legislature has power to regulate and restrict the sale of intoxicating liquor, and to revoke license and close places where sold under it upon conviction of offence against liquor law.

STATE EX. REL., CITIZENS' NATIONAL BANK v. GRAHAM.

Wirt County, Judgment Reversed.
Brannon, Judge.

SYLLABUS.

The inclusion of ten per cent. damages on the principal and interest of a money judgment and costs from the date of the judgment to its dissolution, on the aggregate of principal, interest and costs, does not bar a recovery of counsel fees spent in defense of an injunction bond with condition to pay the judgment and costs, and "also such damages as shall be incurred or sustained by the person enjoined."

2. In an action on an injunction bond, with condition to pay a judgment and costs, "and also such damages as shall be incurred or sustained by the person enjoined, in case the injunction be dissolved," reasonable counsel fees for service in the Supreme court, may be recovered.

3. The fact that the amount of a judgment collected by execution from the judgment debtor exceeds the penalty of a bond given under an injunction against the judgment, will not preclude recovery of counsel fees for services in procuring a dissolution of the injunction in an action on such bond.

On the recommendation of Pardon Attorney Pierson a pardon was granted to Rozzly M. Sine, a 16 year old boy from Marion County who was serving a six months sentence for carrying a revolver. The boy made no effort to use the pistol but carried it merely to scare off a man who had threatened to beat him for gathering some vegetables to which he was rightly entitled.

BOGGESS v. BUXTON, CLERK.

Mason County.

Writ Awarded.

Brannon, Judge.

SYLLABUS.

1. The Supreme Court of Appeals has jurisdiction of the writ of mandamus, though at the adoption of the constitution such writ did not apply to a subject matter to which it has been made applicable by statute.

2. The legislature has power to formulate, prescribe, modify and alter remedies, so its action does not impair the obligation of contracts or vested property rights.

3. Section 89 of chapter 3 of the Code (1906) is not contrary to the constitution, Art. VIII, sec. 3, in giving the Supreme Court of Appeals jurisdiction by mandamus to compel election officers to legally perform their duties.

4. In absence of statute, courts do not exercise jurisdiction to interfere or control, in matters purely political, pertaining to the management and proceedings of a political party.

5. When the state and congressional committees and a congressional convention and a state convention of a political party have had the claims of two contesting county executive committees to represent the party before them for decision, and have decided than one of them is, and the other is not, the true and legitimate county executive committee, the courts will not review such decisions, but will hold it conclusive in matters before the courts involving the question which is the lawful county executive committee.

6. It is the duty of a clerk of a circuit court to appoint as a ballot commissioner to represent a political party on the board of ballot commissioners a person designated by the chairman of the county executive committee, when that particular committee has been held and recognized as the true and legitimate committee in contests between two competing committees and the congressional and senatorial nominating conventions, involving the rights of such county committees to act for the party.

7. The clerk of a circuit court has not sole and final power to decide which of two persons designated by a chairman of two competing county executive committees of a political party for appointment as ballot commissioner; but his action is subject to review and control by the courts. He can be compelled by mandamus to appoint the proper person.

STATE v. BOOKER.

Fayette County.

Affirmed.

Robinson, President.

1. Objection on the ground that ample time was not allowed the prisoner to prepare his defense at the trial, cannot be made upon appeal if the record does not show the denial of a request for time.

2. When the record does not purport to contain all the evidence ad-

duced at the trial, questions as to the admissibility or weight of evidence which must turn on an examination of evidence not made a part of the record cannot be considered.

3. The act of intercepting a letter written by the prisoner, in the hands of a jail-keeper, and using it as evidence against him, though it be incriminating, is not a violation of the constitutional provisions against unreasonable search and against compelling one to become a witness against himself.

4. Unrefuted evidence of silence by one when charged with a crime in his hearing by his co-indictee, though the party remaining silent be under arrest or in custody, is admissible for the consideration of the jury when the circumstances are such that an innocent man similarly situated would naturally speak in denial.

5. To warrant a new trial on the ground of after-discovered evidence, diligence to secure the evidence in the first instance must be shown.

EWART et al. v. NEW RIVER FUEL COMPANY.

Raleigh County.

Affirmed.

Robinson, President.

1. A judgment upon a trial by the court in lieu of a jury will not be reversed because of the admission of improper evidence when the judgment is nevertheless legally warranted.

2. The defendant can take no advantage of a motion to exclude the plaintiff's evidence if he introduces evidence after the motion is overruled.

3. When the court acts at a trial in lieu of a jury it may properly hear a part of the case at one term and a part at a later term.

NOYES v. CAPERTON.

Kanawha County.

Affirmed.

Williams, Judge.

SYLLABUS.

1. An agent can not recover commissions on a sale made by the owner after the contract of agency has expired, unless the agency has been extended, and the agent has performed his part of the contract, or has been prevented from doing so by the fraudulent conduct of the principal.

2. If the extension of time in a written contract beyond its stated limitation, depends solely on implication deducible from the subsequent conduct of the contracting parties, the jury must determine whether it amounts to an implied agreement to extend it.

3. Point 4 of Syllabus in *Parker v. Building & Loan Association*, 55 W. Va. 184, approved and applied.

COUNTY COURT v. BRAMMER, ASSESSOR.

In Mandamus.

Writ Awarded.

Miller, Judge.

SYLLABUS.

1. Mandamants will lie to compel a county assessor to extend a levy laid by a county court in the exercise of its general jurisdiction, unless the same has been judicially determined to be illegal.

2. A county court which lays a county levy is not a special tribunal established for that special purpose, but for that purpose is a court of general jurisdiction; and its act in laying such levy, though not exercised in the usual form of judicial proceedings, is judicial in its nature, and cannot be attached in any collateral proceeding.

3. Although the special bridge levy involved in this case was laid by the county court pursuant to section 2, ch. 9, Acts 1908, as amended by Ch. 66, Acts 1909, and the rules and regulations prescribed thereby, it was nevertheless an act done in the exercise of its general jurisdiction.

4. The special bridge levy laid by the county court of Pleasants county in the year 1910, pursuant to said section 2, ch. 9, Acts 1908, as amended by Ch. 66, Acts 1909, is not illegal and void because it laid no such levy in the years 1908 or 1909.

5. While the general rule is that statutes conferring powers of taxation should be construed with strictness, they should not be so strictly construed as to defeat the manifest purpose or intent thereof. All that this rule requires is that the statute is to be confined to such subjects or applications as are obviously within its terms and purposes.

6. Applying this rule, the legislature by enacting said section 2, ch. 9, Acts 1908, as amended by Ch. 66, Acts 1909, did not intend to limit the right to lay special bridge levies to those counties alone which had laid such levies for 1908, or for 1909, but to prescribe a limit of time within which all counties, not otherwise disqualified by the act, might begin and continue the same.

7. The remedy of the State Tax Commissioner in such cases, is not by instructions to the county assessor, to disregard a levy laid by a county court, but by some appropriate process, as by mandamus, or a like process in a court of competent jurisdiction.

REYNOLDS v. REYNOLDS.

Wood County.

Reversed in Part. Affirmed in Part.

Miller, Judge.

SYLLABUS.

1. To justify a decree of divorce on the ground of desertion or abandonment without justifiable cause, the evidence thereof must be full and clear.

2. Desertion cannot be inferred from the fact that the parties do not live or cohabit together.

3. Justifiable cause, which will excuse a husband or wife, from leaving the other, must be such as could be made the foundation of a divorce from bed and board.

4. The conduct of the one party, which will justify desertion by the other, must be of such a nature as is inconsistent with the marital relations, or to render cohabitation unsafe.

5. A case in which the facts proven were held to be insufficient to constitute good grounds for desertion.

6. Neither the refusal of sexual intercourse, nor the fact that the parties occupy separate houses or apartments, will alone constitute good grounds for desertion.

7. It is error for a court, upon decreeing a divorce from bed and board, to vest the title to the husband's real estate in fee in the wife as permanent alimony, unless there be special circumstances calling for such decree.

8. The general rule is that the income of the husband, whether derived or to be derived from his personal exertions, or from permanent property, or from both, is the fund from which alimony is derived, and from which there should be a personal decree, the amount to be determined by the circumstances of each particular case.

STATE ex rel T. C. TOWNSEND, STATE TAX COMMISSIONER.

v.

THE BOARD OF EDUCATION.

Wood County.

Writ Refused.

Poffenbarger, Judge.

SYLLABUS.

1. The proviso incorporated in section 21 of chapter 27 of the Acts of 1908, as an amendment, by chapter 90 of the Acts of 1909, authorizing the board of education of any district which contains an incorporated city or town where a graded or high school is maintained, which is continued for a longer period than six months, to lay a levy in addition to the general levies in said section provided for, sufficient for all purposes to conduct the schools of said city or town for the term fixed, applies to independent school districts in which such graded and high schools are maintained.

2. When necessary to accomplish the purposes of said proviso, such additional levy may include provision for the enlargement of the school buildings of such city or town, or the erection of additional new buildings therefor; but said provision contemplates relief only in cases of immediate necessity not mere convenience nor future exigencies.

3. Statutes, delegating the power of taxation, fall under the strict rule of interpretation, but this rule does not authorize the courts to place a construction or interpretation upon them, so narrow as to withhold or deny powers plainly given.

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The Bar

VOL. XVIII

DECEMBER, 1910

No. 12

THE BAR

Official Journal of the
WEST VIRGINIA BAR ASSOCIATION

Under the Editorial Charge of the
Executive Council

Published Monthly from October
to May. Bi-Monthly from June
to September.

Entered as second class matter
August 11, 1904, Postoffice, Morgantown, W. Va., under the Act
of Congress, March 3rd, 1879.

Price, per copy.....\$.10
Yearly, in advance..... 1.00

Advertising Rates on Request.

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The Amendment Will Not Amend

Among the many other eccentricities manifested by the voters at the November election they declared that they would rather have the unconscionable delay in the business of the Supreme Court of Appeals than to pay for two additional judges to help expedite it.

The ballots either decided that or they indicated that the particular plan proposed was not less objectionable than the delays—that the remedy was as bad as the disease.

So far as observed there was no open opposition to the amendment, at least by members of the bar. We cannot say that there was not considerable quiet dissatisfaction with the character of the amendment even in the profession, that manifested itself only in the count of the ballots. This is a matter that no fellow can find out.

We venture to say that it would be a fairly conclusive statement—even if it does not explain the vote—to say that some voters who cast their ballots for it did not believe the particular measure was the best, and others voted against it for the same reason.

It was a very clumsy measure, even if it was the least of two evils. It was like Sambo's treatment of the sick cow: When his master asked him how the cow was, he said, "de cow is better, but I believe she will die from de medicine I done gib her."

It is not worth while now to discuss the merits or demerits of that particular amendment. It will not be offered again. But we hope that the next Legislature will submit another amendment establishing an intermediate court of appeals that shall have a limited jurisdiction, which will take from the Supreme Court the cases of minor importance, and thus leave the upper court as now established to deal exclusively with the more important cases.

Too often instead of being sorry for our misdeeds we are merely ashamed that we have been found out.

Virginia Versus West Virginia

In the last issue of *THE BAR* we commented upon the debt case, now pending between Virginia and West Virginia, in the United States Supreme Court, with the special and only purpose of pointing out that the holders of the so-called "West Virginia Certificates" were the real and only plaintiffs in the case, and would be the real beneficiaries in a judgment for the plaintiffs and that a large number of West Virginians were numbered among the plaintiffs.

The *Hampshire Review*, edited by Hon. John J. Cornwell reprints the article from *THE BAR*, and accompanies it with some editorial comments misconstruing the purpose of the article to be a criticism of the management of that case by the eminent lawyers who have it in charge.

We have too good an opinion of Mr. Cornwell's ability as a lawyer to believe that he got such an interpretation as that out of the article itself, or that even the Philadelphia lawyer of unrivaled fame, could accomplish that; and therefore we attribute his remarkable discovery not to anything he actually found in our article in *THE BAR*, but rather from what he desired to find, and generously credited us with his own opinion under cover of that article.

We are not egotistic enough, or presumptuous enough, or so lacking in professional courtesy as to set up our personal judgment against the able and eminent counsel who are managing that case. We know little or nothing about its management; and even if we knew enough to form a judgment, and that judgment was adverse, we would rather defer to the judgment of the men who have studied it, and who have the responsibility for it, and who are entitled to the credit of knowing what they are about.

But as the case has developed, we who have been watching it from the outside have discovered that one point which concerns the merits rather than the management, has come prominently to the front; and that is, as to who are the real plain-

tiffs and who will be the real beneficiaries in the case if a judgment is rendered against this state.

When the suit was first instituted we were specially interested to discover whether Virginia was really seeking to recover on the so-called West Virginia certificates which she had arbitrarily issued in our name for one-third of her debt, and we took occasion to look into this question and were misled by the manner in which the case was presented to conclude that Virginia was smart enough not to make these certificates the basis of her claim or found her suit upon so flimsy a foundation.

Nevertheless, as the brush has been cleared away, it conclusively appears that these same West Virginia certificates are the real basis of the claim for which Virginia is fighting: that Virginia, in fact, is simply the agent for the holders of these certificates; that one-third of Virginia's debt has been paid by the creditors' acceptance of these certificates, whether she wins or loses; that the original holders of Virginia's bonds have agreed to exchange, and have consummated an exchange of Virginia bonds for an equal amount of West Virginia certificates; and, as we have said, by the very act of instituting this suit, and as a consideration therefor, one-third of Virginia's debt is cancelled whether she wins or loses. Virginia as the ostensible plaintiff has no interest in the suit except to prosecute it to a conclusion. She will not share to the extent of one penny in a judgment for the plaintiff, nor lose one penny on a judgment for the defendant, even to the extent of paying that in costs. Every dollar that is recovered in that suit, if any is recovered, will be distributed pro rata among the holders of these spurious certificates—a large part of which, we repeat, are held and owned by citizens of this state.

This is the "true inwardness" of the West Virginia debt case, and we shall discount our judgment to an irreducible minimum if the highest court in the land recognizes and rewards the unprecedented judicial obliquity of a state masquerading as a plaintiff in a suit in which she has no interest in order to circumvent the constitutional inhibition that precludes the real

plaintiff in interest. We shall be surprised if such subterfuge and imposture as constitutes the warp and woof of the "plaintiff's" case is not, when stripped of its covering, adjudged a contempt of court. That great tribunal, the greatest court in the world, is not a justice's shop, and has some concern for its dignity and integrity, if suitors have not.

A Rare Bit of Judicial Literature

We publish on another page, a dissenting opinion once delivered by Judge Jeremiah H. Black, that might be listed among the "hitherto unpublished" opinions, which, like everything else he ever wrote or spoke, is worth reading for the style and temper, if nothing else.

Judge Jere. Black was, in his day, probably the most formidable trial lawyer at the national bar, and one of the biggest all round men the country has known. His argument before the Tilden-Hayes commission is in a class by itself as a sample of the literature of the judicial forum.

So is this dissenting opinion one of the most caustic and characteristic productions to be found in its class. It reads like it was written with a two-edged sword. The subject-matter of the opinion, too, will not be without local interest, in view of what passed in our Supreme Court a few years ago.

A SURE WINNER.—Not long ago a Swedish lawyer practicing in Minnesota was credited, by mistake, on the court calendar, with being attorney for both plaintiff and defendant in the same case. When the case was called, a ripple of merriment ran through the courtroom. The judge rapped for order, and business was about to be resumed when the Swedish lawyer audibly observed: "Aye tank aye skell vin dot case."

STAGING A TRIAL.—"I ask that a recess be taken at this point," stated counsel in the prominent divorce case.

"On what grounds?" inquired the judge.

"My client wishes to change her gown. She hasn't displayed half her her costumes yet."—Louisville Courier-Journal.

Pernicious Partisanship

There is much difference of opinion as to the propriety of the executive head of a government taking active part in party politics.

There is no difference of opinion as to his privilege, and his obligation, perhaps, to assist in promoting the principles and policies for which his administration stands, by making public addresses, and otherwise using the influence of his position to impress the public with his view of public measures and gain their support.

But when it comes to aligning himself with one of the political parties for distinct partisan work, he is going beyond the boundary line where he can expect to have the approbation of the whole people; where he ceases to be the representative of the whole people as he ought to be; and where, we believe, he offends the public sense of propriety and loses caste with even those whose cause he is seeking to promote.

We believe that Mr. Taft has suffered, and Mr. Roosevelt suffered, and any president or executive, who ought to be the representative of the whole people, will suffer, in the esteem of the people, when he appears to regard himself simply as a representative of one political party.

DID THE BEST HE COULD.—Magistrates sitting in the central police court have listened to many unusual pleas in excuse for wife desertion or failure to support a spouse, but one of the most unusual was presented by a negro recently whose wife had him summoned before the bar of justice because he had given her no money in three weeks. "Why don't you support your wife?" the magistrate asked. "Well, you see, it's this way, boss," replied the man. "I've just started a bank account, and I don't make enough to keep that going and support the old woman, too, so I had to let her go."—Philadelphia Times.

Our friends are like our clothes—unless they wear well we get little satisfaction out of them.

The Unwritten Amendment

The people of the United States have never, we think, made a mistake in the man they have elected to the presidency. Partisans have thought so when defeated at the polls, but it has not proved so.

Careless as voters seem to be, we believe it is the rule, rather than the exception, that the average voter does not cast his vote for president without some careful deliberation and intelligent estimate of the man.

The people guard the presidency as they do the door of their own homes. And when the limelight of a presidential campaign has been turned upon the candidates for two or three months every voter has sized them up, and it is very difficult, if not impossible for an unfit man, lacking either in personal character or statesmanship to slip into that office.

The recent campaign, although not involving directly an election of the president, furnishes a good illustration of the care with which the people guard that office. It was believed by the voters that what may be termed the unwritten principle of our constitution against a third term, was an issue, and there can be no question but that had a strong influence in determining the results of the election, especially in the state of New York. We cannot mistake the veneration with which the people still regard the great precedent which Washington established on that matter. We believe it is stronger now than in Washington's day. We don't believe that any man is big enough or popular enough, or considered so indispensable by the people as to make him available against that precedent.

The example of Washington was written in our constitution by Thomas Jefferson in his farewell address to the people whom he had served so faithfully, in the following words:

"That I should lay down my charge at a proper period is as much a duty as to have borne it faithfully. If some termination of the services of the Chief Magistrate be not fixed by

the constitution or supplied by practice, his office, nominally for years, will in fact become for life: and history shows you how easily that degenerates into an inheritance. Believing that a representative government responsible at short periods of election is that which produces the greatest sum of happiness to mankind, I feel it a duty to do no act which shall essentially impair that principle: and I should unwillingly be the person who, disregarding the sound precedent set by an illustrious predecessor, should furnish the first example of prolongation beyond a second term of office."

The immeasurable debt which the public owed to Grant, the commander of its mightiest armies, could not swerve the American people from that tradition, and the principle of the third term was embodied in the following resolution, passed by the house of representatives on December 15, 1875:

"Resolved, That in the opinion of this House the precedent established by Washington and other Presidents of the United States, in retiring from the Presidential office after their second term, has become, by universal consent, a part of our republican system of government, and that any departure from this time honored custom would be unwise, unpatriotic, and fraught with peril to our free institutions."

KNEW THE REMEDY.—"In Mayor Gaynor's early days on the bench," said a Brooklyn lawyer, a "prisoner's counsel said, in the course of his speech, 'medical witness will testify that my unfortunate client is suffering from kleptomania, and, your Honor, you know what that is.'"

'Yes' said Judge Gaynor, 'I do. It is a disease the people pay me to cure.'"

BADLY MIXED.—"How far is it between these two towns?" asked the lawyer.

"About 4 miles as the flow cries," replied the witness.

"You mean as the cry flows?"

"No," put in the judge, "he means as the fly crows."

And they all looked at each other, feeling that something was wrong.—Everybody's.

Did you ever stop to wonder what a lot of mischief you might get into if you didn't have to work so hard for a living?

Dirt

There is no one thing upon which the prosperity and development of this state depends more, just now, than upon the good road problem.

There is no lack of appreciation of this fact; there is no lack of ambition to have them; there is no lack of agitation of the subject; there is talk enough; there is literature enough; there is law enough; there is tax enough; and there are more than enough different schemes to bring about what we all want.

But the trouble is there is nothing doing toward the actual making of a good road.

There are just two things for the people of West Virginia to do in this direction before we will begin to work out this problem of good roads:

The first is to accept and settle down to the fact that for the next two or three generations we will have to depend on good dirt roads.

And the second is to accept the fact that a good dirt road is possible and practicable and to learn how to make it and then go about it.

Get rid of the delusion that a dirt road is not a good road. A real scientifically made dirt road is, for six months of the year, the very best road obtainable, and for the other six months will be nearly as good as the best. Moreover, a properly made dirt road costs less in the long run than a bad dirt road. If our revenues in the past have been equal to maintaining bad dirt roads they will be ample for good dirt roads all over the state.

We are not romancing, we are not rainbow chasing, but we will undertake to make a practical demonstration of the practical success of every position here presented, and if we fail we will pay the cost of the experiment.

To make a good dirt road that will be durable, and satisfy the most fastidious in the summer and be passable in the winter months, it is only necessary to apply a little common sense (we won't call it science) in shaping up the surface of the road. The

chief enemy of a dirt road is water. If it was always dry it would always be smooth and hard, winter and summer, provided it was originally smooth. The *sine qua non* in maintaining a dirt road, therefore, is to have its surface so shaped as to prevent the water standing on it so as to soften it, or running on it so as to wash its surface away.

This is easy. If the surface is rounded up—that is if it describes a semi-circle measuring across its center from each side -- no water will stand on it any more than it would stand on the surface of one-half of an apple set on the ground. Neither would the water run parallel with the road even on a hill, but would go immediately into the side ditches whether the grade was flat or steep.

This is so simple, common sense a matter that it seems puerile to emphasize or even suggest it. Yet we will wager dollars to peanuts that there are not ten miles of such made dirt roads in the state. So simple a matter solves the good road problem in West Virginia. While all manner of abstract theory and impossible plans are being discussed and abandoned, the a b c of the good roads is passed over.

But a proper shaped road surface does not make itself, nor do the county engineers specify it, nor will the men who dig and shovel make it, even under the specifications of an engineer. The use of a "grade board" as it is designated where in use, is the only way to get a properly shaped road surface. The "grade-board" is an arched board thirty feet long, set across the road with one end in each ditch, and describing the arch that the roadbed shall take, and the men making the road must fill up to the arch of the board before the road is finished.

We repeat that what we want in West Virginia is to quit discussing and go to work. The only road within our reach is a dirt road. Therefore let us make it. Get down to business. The only way to have a road is to make a road. And that, too, is the only way to demonstrate whether it is a good or a bad road. Build a sample mile of dirt road, as it ought to be built, in each county and thus test it..

The writer is not a practical road maker, but boasts the ability to know a good road when he sees it. Believing that good roads are the greatest civilizing agencies known to any country, he has all his life been an interested observer and student of road making. Some years ago, while visiting the city of St. Louis, he observed a test being made of the durability of road material. A great iron wheel was being propelled in a circle over different samples of road material. Among the samples was a square of ordinary hard brick. That brick showed wearing qualities better than any sample in the list except granite!

We could not get away from that demonstration. Its possibilities impressed us, and we brought the impression home. At that time brick had never been used as a paving material for a road or street. But we asked, why not? It was cheap. It was equally within reach of every city or town, and it would make a smooth and beautiful street. We entered on a campaign of agitation for brick paving for streets chiefly through the *Wheeling Register*. Wheeling streets at that time were paved with cobble stones—the most noisy and abominable nuisance imaginable. We asked, and continued to ask, why Wheeling should not be paved with brick. And wheeling laughed and continued to laugh at the suggestion.

Our campaign met with nothing but ridicule for about a year. Then Senator Scott, who was a member of the upper branch of the city council, as he is now of the upper branch of Congress, offered a proposition to pave a piece of street in front of one of the market houses with brick. He carried it through his branch of council but it was voted down in the lower branch. But the agitation went on until one of the principal streets of the city was paved with brick. No sooner was this done than the whole city was clamoring for brick paving. Not only so but delegations from Ohio towns and cities, and from several states, came journeying to Wheeling to see that brick paving—which inspection was generally followed by brick paving in probably three-fourths of the cities from which these delegations came.

We all know that now brick is the chief material used for the streets of the towns and smaller cities all over the country. And the beginning of it was that experiment and object lesson made in the city of Wheeling

This little chapter in the history of road making is not inspired by any desire to exhibit the personal pronoun that figures in it, but simply to "point a moral," which is this: If a little bit of common sense applied to brick resulted in good, comely streets in towns and cities throughout the country, why may not an equally small bit of common sense applied to dirt result in first class public highways throughout the state of West Virginia?

Respectfully submitted to the commissioner of roads.

The Issue That Unites

*"Sovereign Law, that state's collected will,
O'er thrones and globes elate
Sits empress, crowning good, suppressing ill."*

THE BAR has gratulations to offer for one thing made manifest in the recent political campaign, that appeals to every member of the legal profession no matter what his party affiliations may be.

There were injected into that campaign and into the American thought, views that had to do with the foundations of the Republic; views which, if accepted by the nation, were absolutely destructive of the venerable system of triple governmental divisions; and substituting therefor—for the courts, for the Congress and for an executive of enumerated powers—a "steward of the public welfare," with autocratic powers as supreme as those of a czar.

The author and apologist of this new departure was a man of national and world-wide distinction, of commanding influence and ability, associated with many virtues of personal character, which even his enemies respect and admire: yet pursuing his

ends with a boldness and imperious and arrogant impatience toward whatever hinders or stays him, whether it comes from men or from laws; and defying and threatening in his attitude, it was believed, to override that great unwritten principle of our constitutional system that draws the line on two terms of the presidency—this “foremost citizen of the world,” though confining his campaign chiefly to one state of the Union, got the ear of the nation, and the people of the nation when they went to the ballot box on the 8th of November felt that one of the issues of the day had to do with the fundamentals of our constitutional government.

We are glad to believe that this was in the thought, and that this matter largely influenced the ballots of the people throughout the nation at the recent election; and that it affords another comforting assurance and illustration, rarely occurring in our history, that whenever the semblance of danger threatens our institutions, menaces the integrity of our government, the supremacy of its laws, the limitations of its constitution, or the substitution in any form of a government of men for a government of law, the people may be depended on to rally to the standard of the Old Nationalism, and their ballots will ring true every time.

It has been well said that when a foreign foe threatens us we are ready with our bullets, and when an internal foe raises its head we are ready with our ballots.

We are one people. We are all Americans. We are partisans only as to policies. And when those policies touch the fundamentals of our Republic we are no longer partisans but patriots.

A LIMITED PARTNERSHIP.—The frequency of divorces of late years in the United States has evidently made a deep impression on the mind of a Colorado justice of the peace, who, in marrying a couple, is reported to have concluded the ceremony with the words, “I therefore pronounce you man and wife, until you are divorced.”

In the Air

There is nothing more inspiring in this day and generation than the every day conquests in the development of aviation. In the language of the street, "we are getting there." The most optimistic forecast can scarcely overdraw the consequences that are sure to follow the practical solution of this problem to this generation and to mankind.

There has been nothing more sensational in the history of the human race, when we think of it, than the feats of the "bird men," as described by the daily press, in their flights from Belmont Park, New York, to the Statue of Liberty and back during the recent "meet" at that city. There never was a melo-drama nor a fiction that contained any more improbability, or better illustrate the Yankee courage and daring when dealing with a new problem, than the story of the American stripling, John B. Moisant, who, after smashing his own aeroplane and apparently losing his chance to enter the race bought a new machine for an excessive price in a bargain made over a telephone with a disabled pilot of the air, jumped into it, soared up above a vast assemblage of people at the last moment, held his way straight over the roofs of a populous city, driving the engine at top speed, reached his goal, rounded it and sped back 2,000 feet in the air to snatch the rich prize from the hand of the man whom everybody believed to be the victor.

Was there ever anything more dramatic in sport? The playwright would hesitate to contrive such a situation and work out the sequel. In England they will say it was very American, and the feat will enhance our reputation as a people who do unheard of things on the spur of the moment.

THE EXCELLENCE OF SIMPLICITY—"It's a lucky thing fob de human race," said Uncle Eben, "dat de Ten Commandments wasn't loaded down wif phraseology like de laws de legislature passes."

It Will Not Down

There is a movement on foot in this country, so universal, so intense, and so well backed, that it is bound to result very soon in a radical reformation in the practice and procedure of our courts.

THE BAR makes the prediction that this will come within the next five years—probably sooner, but not later. Stick a pin there.

It will probably come in the Federal courts through legislation enacted at the approaching session of congress. That legislation has been already formulated, and President Taft is intent on speedy action. He has said that "The improvement of the administration of justice, civilly and criminally, in the matter of its prompt dispatch and the cheapening of its use for the poor man, is the most important question before the American people."

We think that the majority of the lawyers who study the plan proposed to be enacted by the Congress for the reform of the federal courts, will be sorry to see it pass.

We will not be surprised, too, if this movement breaks into the next session of the West Virginia Legislature and makes all the bar sorry for the result.

We do not believe a legislative body is the best tribunal for such a work as that of reforming the procedure of our courts. We are sure it is not. The average legislator who is not a lawyer, knows as little about regulating the procedure of the courts as he does about running a machine shop if he is not a machinist. We will be very sorry if he attempts it.

But nevertheless the reformation is coming to the courts of West Virginia. It will be attempted. It cannot be kept back. And who will say that the legislature shall not meet this demand? Who has the power to say it nay? And, indeed, if it is not done, and the people demand reform, to whom will they appeal if not to the legislature?

There is only one way to prevent a bungles and an abortion in this matter, and that is for the bar of the state to whom the work properly belongs, who are most interested, and most capable, to undertake this work and bring about an improvement in the administration of the courts that will satisfy and silence the public demand.

This is the proposition which THE BAR has been urging and continues to urge. The characteristic tolerance of the lawyer, and his habitual attitude of neutrality, if not of suspicion toward a new departure that is not fortified by precedents, makes all kinds of reforms, or attempts at reforms depending upon his espousal, difficult if not discouraging.

The simple proposition before the lawyers of West Virginia is whether they prefer that the reforms which are demanded in our courts shall be made by legislation, or shall be worked out by a commission of judges, such as THE BAR has proposed; or in other words whether the bar of the state will let the matter go by default until it drifts into the legislature where a small committee will hurriedly cook up some measures intended to reform, and which will be passed by a majority vote of members who know nothing about the subject; or whether they, the lawyers, will ward off this calamity by getting the Legislature to commit the matter to a commission of competent and impartial men.

This journal solicits the views and judgment of the bar of the state upon this matter. We do not know any other or better way of ascertaining that judgment than by exchanging views through this journal—a privilege to which they are all entitled. We would like to hear from all the judges. And we would like to hear from at least one of the members of every county bar his personal views, and if possible the general views of his local bar.

1. Does he prefer that the reforms demanded in our court procedure should be made by the Legislature; or

2. Does he prefer that they should be made through a commission of lawyers appointed by the Legislature?

3. What are his views upon the plan heretofore presented by THE BAR, (See August-September number) of constituting the circuit judges, together with one judge of the Supreme Court, and a committee of the State Bar Association, a standing commission to make, publish, and from time to time, revise and amend a code of rules of procedure that should be binding and have the force of law in all our courts?

4. Is there any other or better plan?

Those Pesky Depositions

We do not want the matter of improving the mode of taking depositions in Chancery to pass out of the mind of the bar of the state.

That subject is still open for discussion and for new suggestions.

Any one of the plans already proposed would be an improvement on the existing method. Either the plan of having a Master in Chancery, invested with the jurisdiction of a circuit judge, to preside at the taking of depositions; or the amendment of the law providing for the election of special judges, so as to have one preside over depositions, as proposed by our friend J. R. Donehoo, would, it seems to us, be a solution of the problem.

Why should not this matter be settled by the coming Legislature?

CONFUSING THE COURT—Senator William Alden Smith relates this story of an Irish justice of the peace in Michigan, says Washingtonia. In a trial the evidence was all in and the plaintiff's attorney had made a long and very eloquent argument, when the lawyer acting for the defense arose.

"What you doing?" asked the justice as the lawyer began.

"Going to present our side of the case."

"I don't want to hear both sides argued. It has a tendency to confuse the court."

Reform From the Viewpoint of the Circuit Judges

The Circuit Judges are responding quite heartily to our invitation to discuss the proposition relating to a Commission to reform our court procedure.

We have in hand some communications that will appear in due order, received too late for this number of *The Bar*.

The first of the series appears on another page of this edition, by Hon. W. A. Parsons, of the Fifth Circuit, to which we invite the attention of our readers. Others will follow in due course, and we hope to have the suggestions of every Circuit Judge.

In the multitude of counsel there is safety. We don't expect absolute agreement on any proposition, but we hope to see enough uniformity on a specific plan to justify action in the near future. When all the Judges have spoken it will at least be possible to eliminate the serious objections.

A MONOPOLY OF WATER—A Scottish gamekeeper found a boy fishing in his master's private waters, says an exchange. "You musn't fish here!" he exclaimed. "These waters belong to the Earl of A——." "Do they? I didn't know that," replied the culprit; and laying aside his rod, he took up a book and commenced reading. The gamekeeper departed, but, on returning about an hour afterwards, he found the same youth had started fishing again. "Do you understand that this water belongs to the Earl of A——?" he roared. "Why you told me that an hour ago!" exclaimed the angler, in surprise. "Surely the whole river don't belong to him? His share went by long ago!"

ASSUMPTION OF RISK IN MARRYING—A man assumes the risk, when he marries, that his wife may not love him. *Scott v Scott*, 61 Tex. 119.

Non-Legal Causes For Divorce

By E. DeForest Leach

Of Moundsville, W. Va., Member of the National Congress on Uniform Divorce Laws, Author of "Sexual Perversion and Its Relation to Crime," etc., etc.

TO THE BAR:

As an attorney in general practice I soon came to the conclusion that a very small proportion of the divorces granted were desired primarily because of the commission of some statutory matrimonial offense. I should say that, if all the facts were known, not more than one case in ten would be found to be of that character.

Not infrequently the lawyer is consulted in order to ascertain the quickest and easiest way to dissolve a matrimonial alliance which has become intolerable, regardless of the commission of statutory offences. Indeed, it is doubtful whether a simple violation of the law has as much to do in causing domestic infelicity as has many other things. But even when a statutory offence has been committed, there is always a reason.

It is these conditions which inspire a desire for a dissolution of marriage that lie at the bottom of the divorce question, and they must be studied in an unprejudiced manner before any material progress can be attained in even understanding this class of social phenomena. It is not enough when a husband leaves a virtuous wife to consort with harlots, or when a wife deserts a respectable husband for the embraces of some Beau Brummel to say that they are "devilish" or moral degenerates. Witches used to be considered accompanices of the devil and religious fanatics as the incarnation of the Holy Ghost. We know better today, however. There was a reason then, just as there is a reason now, but people did not understand it. The only excuse, it seems, that has ever been needed to lay the responsibility for an act upon God or the devil is to have the cause therefor outside of the range of our information.

With a desire to either prove the error of my own views or to ratify them I sent out about three thousand letters to physicians throughout the United States. These letters asked for opinions upon several phases of the divorce question, founded upon their experience as practicing physicians. One of the queries was: "What are the principal primary causes for divorce? Court records show adultery, desertion, etc., but are these primary or secondary causes?" Eighty-nine per cent of the physicians who replied were unanimous in saying that adultery, desertion, etc., are not the primary causes for divorce, but that the real causes may be generally expressed as being "improper marriages and unnatural marital conditions."

In classifying these conditions, we find, in the first place, some persons who ought never to have married at all, it being impossible for them to make satisfactory mates for any one. Then, there is a much larger class of men and women who ought never to have married the persons they did. To use a common expression, they are now mismated, but might, if married to other spouses, experience all the superlatives of connubial bliss. Lastly, there is a still larger class which includes those whose marriages were satisfactory in the beginning and seemed to prophesy a long and happy union, but, because of ignorance, indiscretion or actual abuses, have been turned into veritable hells.

The conditions included in these three classifications are not recognized by the church, the law or the general public, although physicians and those possessing knowledge of sexual phenomena believe that they are the inspiration of a majority of all domestic difficulties. To understand all these causes necessitates a comprehensive knowledge of the physiological, pathological and psychopathical conditions of the persons involved, which, of course, would require the training and analysis of the specialist.

The anarchy of our divorce laws is very clearly shown in a case coming under my personal observation. The wife married a widower whose former wife had lived only a few months in wedlock. The first night after the marriage the husband exhib-

ited such depraved sexual perversions that his young wife was at first shocked, then disgusted, and finally made her escape by climbing through a window. The experience of only a portion of the night was sufficient to make her a physical wreck for nearly two years. Of course, she could never return to her husband and preserve either her health or self respect. To say that she loathed the man is only partially expressing her feelings. It was doubtful for a long time whether she would ever thereafter even respect any man. Naturally she desired a dissolution of the marriage, but every lawyer that she consulted told her that she had no grounds for divorce. Instead of getting consolation in her hour of trial out of her religion, it had taught her that she should offer up her body, her youth and her desire for motherhood as a sacrifice on the altar of duty to satisfy the tenets of a dogmatic faith.

After a time a specialist who was called into the case and knew of my investigations along this line, laid before me the facts which he could testify to as an expert, and with much difficulty I succeeded in preparing a case which was good on the face of the pleadings and was not incompatible with the facts proven. The defendant employed counsel to fight the case, but after learning the nature of the evidence was persuaded by his own attorneys not to resist the granting of a decree for absolute divorce.

After the health of the victim had been restored, her desires again became normal and she once more married. This marriage has now continued for several years, and both husband and wife profess to be entirely satisfied.

Of course, my ecclesiastical friend will say that this is an isolated case—an exceptional one at least—and that the law cannot be expected to apply to freak cases. I reply that while this may be an exaggerated case, it is by no means exceptional. So prevalent and variable are perverted sexual natures that it is about as surprising and as difficult to discover the abnormal and distinguish between it and the normal as it is between sanity and insanity. It is not necessary that these perversions

or peculiarities be so pronounced as to manifest themselves in criminal tendencies or abnormal social behavior. Indeed, many conditions which can hardly be classified as abnormal, are, nevertheless, important enough to destroy the happiness of married life. Sometimes the difficulties are discovered and are occasionally corrected, but much less is known of these cases than would be if the persons afflicted recognized their condition as being abnormal. This they seldom do. They only realize a difference during their relation with a normal person, and then feel that they themselves are normal while their consort is "peculiar."

That divorces are not caused primarily because of the commission of statutory offenses can readily be ascertained by comparing the divorce rate in states having only a small number of statutory causes with that of other states having more liberal laws. New York has but one ground, yet the divorce rate is higher in that state than in New Jersey which has two grounds and almost as high as in Pennsylvania, which has four. The fact that New York has made adultery a prerequisite to a divorce has compelled the residents of that state desiring a divorce, from whatever cause, to commit adultery, and, in consequence, there are more divorces granted for adultery alone in New York, in proportion to population, than for both adultery and desertion in New Jersey, and almost as many as for adultery, desertion, cruelty and imprisonment in Pennsylvania.

Scandal in divorce cases can hardly be avoided so long as our divorce laws are framed to comprehend only fictitious grounds and married persons are obliged to do scandalous things before the courts will give them relief from intolerable and, oft-times, degrading marital relations. Many people, either from religious prejudice or pure shallowness, think that when they urge drastic or restrictive legislation in divorce matters they are working toward morality, when, in fact, they are usually doing exactly the opposite. There is no virtue in such legislation and may be much harm, for divorces cannot possibly be conducive of more immorality than drastic legislation has proven itself to

he. Then, too, any kind of a divorce is better than a bad marriage.

Debt on Judgment By Faciebam

TO THE BAR:

Our court has not had occasion to consider whether a judgment creditor may "vex" his debtor with a fresh suit instead of issuing an execution.

A got judgment against B in the circuit court in 1877 and kept it alive, and in 1909 brought debt on this judgment in the same court. B demurred on the ground that "debt does not lie if you may issue execution."

In *Beasley v. Sims*, 81 Va., Judge Lacey volunteered his "legislative" opinion that "debt on a judgment was odious." The question before him was, whether a cause of action was "merged in the judgment" 13 Cyc, 410, n, 42 says, "Some courts discourage actions of debt on judgments."

Prior to *Westmr. 2nd* (A. P. 1250) you were obliged to bring debt to revive your judgment if you had not issued execution within the year. *Fleming v. Dunlap*, 4 Leigh. *Westmr. 2nd* gave the writ of *scire facias* to revive the judgment.

At an early day the court decided that the remedy of *sci fa* was cumulative and did not take away the right to bring debt. But the exact question is, could you bring debt WITHIN the year? Could you bring debt when you could issue execution?

Lee v. Giles, (1830) 1 Bailey, 21 Am. Dec. quotes *Selwyn's N. P.* for the proposition that, "at common law debt lies on a judgment WITHIN, or after, the year." But *Kingsland v. Forrest* (1850,) 18 Ala. 52 Am. Dec., points out that *Selwyn* cites 43 Edw. III, b, 2 (1370) and that *Viner's Abr.*, citing this same case, says, "At common law, if a man had recovered a debt, he might have had an action of debt on his judgment AFTER the year"

It is instructive to observe that the South Carolina judge

spoke as if he had personally examined this decision in 1370, whereas, the Alabama judge was careful to say that he did not have access to it. The chances are that, if any one takes trouble to look at this ancient case, he will find that it dealt only with the question, whether debt was concurrent with *sci fa*. It is unlikely that, if he could issue execution, any one ever brought the then cumbersome and expensive action of debt, involving as it then did setting up the entire record. It results that, until the case in the year books. (43 Edw. III, b 2) is hunted up, we cannot know whether it decides that debt lay concurrently with the right to issue execution.

Lee v. Giles, *supra*. and some other courts, usurping legislative functions, forbid debt if execution may issue. They forbid it on the ground that it would be "vexatious litigation." In his note to this case, Freeman says: "But whatever may be the rule in South Carolina, the doctrine, that an action of debt on a judgment cannot be maintained while such judgment is enforceable by execution, cannot be sustained by the decisions elsewhere. This right is neither suspended nor barred by the fact that, having the right to take out execution, his action seems unnecessary." See Freeman on Judgments, sec 432.

In *Headley v. Roby* (1834) 6 Ohio, the defendant demurred on the ground that execution could issue. The court, not citing any decision, said: "The right to have execution is a remedy cumulative only. We know of no law which would deny to the party the right of action if he chose that remedy, because he could have execution." 23 Cyc., 1502 says, "At common law, and in states where the matter is not affected by statute, the owner of the judgment may bring debt although he may issue execution." *Kingsland v. Forrest*, *supra*, examines the question carefully and holds with Cyc. *Simpson v. Cochran*, (1867) 23 Iowa, 92 Am. Dec., says *Denison v. Williams*, 4 Com., is a thorough discussion and "shows that the right to bring debt, though execution may issue, can not be doubted. * * * If vexatious, the remedy is with the legislature." *Morse v. Pearl*, 67 N. H

68 Am. St.R. and decisions in 23 Cyc. and Am. Dec. would seem to set this question at rest.

Newcomb v. Drummond, 4 Leigh. The court house burnt immediately after plaintiff got judgment. Thereupon he brought debt on his judgment, proving it aliunde. The case turned on another point, but there was an instance where debt was maintained concurrently with the right to issue execution. So it was in *Meichen v. Williams*, 50 W. Va. It is true, the judgment had been assigned, but the assignee could have issued execution. *Reinhard v. Baker*, 13 W. Va.

Reforming Procedure in the Courts

By Judge W. A. Parsons of the Fifth Circuit

Point Pleasant, W. Va., November 22, 1910.

TO THE BAR:

The Bar requests me to write an article on the proposition being discussed, to make the circuit Judges a commission to formulate a code of procedure for our courts. In complying with this request, I desire to say that the prime object of procedure is to bring all cases instituted in the courts to a speedy hearing on the merits, with as little expense and inconvenience to suitors and the public as the orderly and correct administration of the laws of the state will permit.

I am told that as many as forty out of every hundred cases decided by our Supreme Court are disposed of on questions of practice, without touching the merits. Chief Justice Marshall once said that when a case was fully argued and submitted for hearing, he went through the papers and evidence in the case and ascertained the right thing to do, and decided the case according to the right thus ascertained, unless he found some law which prevented him from doing right. It frequently happens that a technical rule of pleading or practice prevents the Judge from deciding the case upon its merits and according to the

substantive law governing the case. In other words, the Judge is obliged, before touching the merits of the case, to undergo the laborious and difficult task of finding out whether the antiquated and absurd rules of procedure, binding upon him, will allow him to decide the case on its merits, and after hours of hard labor, finds in many of the cases that he is so hampered that he can not do right between the parties, however much he may desire to do so. The case is thrown out of court at the costs of an unfortunate litigant, whose only sin was committed in employing a lawyer not able to frame his case according to these absurd and unjust rules of procedure. A distinguished person said: "For forms of law let fools contest, that which is best administered is best." The principle enunciated in the language quoted can not in many cases be carried out, because the rigid and unyielding forms of procedure prevent the Judges from administering the law governing the personal and property rights of the citizen, as the very right of the case requires. I think all of us will agree that if it be possible to do so, some method should be devised to simplify, cheapen, expedite and make uniform the law of procedure in the courts of the State.

The world has two great systems of procedure. One known as the common law system formulated by the common law courts and Parliament of England. The other matured and put in methodical form by the Roman Judges. The legislature at no time during the growth and progress of Roman civil procedure seems to have had anything to do with it. The Chief Judge had "Authority to provide new rules and orders applicable to special cases which might be brought before him." In this way the Chief Judge introduced new actions "enforcing claims never before recognized by the law, and new rules of law applicable to the changing wants of society;" so we see the Chief Judge in Rome was not only a judicial officer but exercised legislative functions as well. The rules and orders thus formulated by the Chief Judge were preserved, and while not binding on his successor or other judges, they were regarded as safe and wise and were carefully followed; and, as we are told,

"after many years a body of edictal law became as well established and as authoritative as if it had received the express sanction of positive legislation." If we institute a comparison, we find that the common law procedure gives us a hard and fast rule which the Judge can not, under any circumstances, disregard, frequently turning the suitor out of court, with his just case, without a trial upon the merits; in this way giving the law of procedure more importance than the right of the case or the substantive law governing the case. On the other hand the procedure of the civil law was so broad and adjustable as to always enable the litigant to have his case heard upon its merits

The English courts feeling that the common law procedure was too narrow, subtle and rigorous, and desiring to rid it of all technicality as to questions of form, procured the passage of several practice acts, the most important of which is the "Judicature Act," which is said to have been prepared by Lord Chancellor Selborne and certain associates from the bench and bar, and was passed through Parliament in 1873, thus receiving the sanction of law. It is conceded that the English Judicature act is the best of all practice acts; it is also conceded, I think, that chapter 125 of our Code is what it should be. We have made less progress in law and its administration in the courts than has been made in any other science. The training of the lawyer and judge is such as to make them dislike change, and they are so much attached to ancient and technical forms as to be unwilling to be guided by reason and justice. The candid lawyer of experience knows that there are three causes for the delay, expense, uncertainty and, in many instances, injustice attending the disposition of cases in our courts. With fully a hundred courts of last resort in the country, turning out varying, confusing and conflicting opinions, the task of the trial judge becomes a most difficult one. He frequently becomes as completely lost in the mazes of uncertain and incomprehensible opinions as ever was a hunter in the laurel thickets of the mountains, or the jungles of Africa. And some judges, like

other people, do not enjoy work, so it is not hard to see one of the causes of delay. The lawyer scheming for an advantage, to avoid having the case come to a trial, to ensnare the trial judge into error, causes delay, expense, uncertainty and injustice. Our common law procedure, with its senseless forms and narrowness, inflexibility and rigor, preventing a trial of nearly half of the cases upon their merits, is the third and greatest cause of delay and injustice.

The civil law procedure was the work of the judges and never received the sanction of legislative enactment, the common law procedure of England and our states was mainly formulated by the common law judges and was not the work of the legislative branch of the government, the various practice acts were all devised by judges and lawyers and received legislative sanction. No man, or body of men, not made up of those trained and experienced in the law, can possibly be fit to undertake and carry to successful completion any system of practice law. The circuit judges would make an ideal commission for this work. They could work in three or more sections, taking the English Judicature act as a basis, and when the work should be completed it should be made authoritative and binding on the courts by legislative enactment.

WM. A. PARSONS.

YOU'LL DO RIGHT IF YOU DON'T WRITE—This anecdote is told of Abe Hummel, whose picturesque career is well known throughout the Union, and well illustrates the fact that it is not always wise to put things in black and white.

A client of Abe's who was in trouble and was deeply repentant, was in Little Abey's office one day, and said to him:

"Mr. Hummel, I have about made up my mind that the best policy for a man is to do right and fear nobody."

"Oh, no," replied Abe, "Your motto should be, 'don't write, and fear nobody.'"

HIS ALIBI.—Game Warden—"This deer was found dead on your premises, and yet you deny that you killed it!"

A Domestic Imbroglio Involving the Law of Three States

The decision of the Court of Chancery of New Jersey in *Dixon v. Dixon* (December, 1909, 74 Atl., 994) is an interesting example of complicated domestic relations under interstate conflict of laws. It was held that where a mother, after securing a judgment in a New Jersey court awarding her the custody of her children, left the State, and the father, on application to the court, obtained a modification of the judgment permitting the children to visit him in the State of New York, where he resided, the order of modification was within the protection of the clause of the Federal Constitution declaring that full faith and credit shall be given in each State to judicial proceedings of every other State.

It was further held that where the mother commenced an action for divorce in the State to which she removed, the court, in such action, might determine the right to custody of the children on conditions arising since the order of the New Jersey court, but could not base its adjudication on evidence of facts occurring before that order.

It was decided that where the mother on application in the divorce suit for an order for the sole custody of the children pending suit offered no evidence of facts occurring since the modified order of the New Jersey court, except that on the return of the children to the mother from a visit to the father, under order of the court, they were in poor health, such poor health not being ascribed to the treatment of the father, an order in such divorce suit, granting the prayer for such custody, being based on the facts occurring before the order of the New Jersey court, was of no effect, since it failed to give full faith and credit to the New Jersey judgment.

The application was to punish the wife and mother for contempt for disobeying the modified order of the New Jersey court directing that the children should be sent with their

nurse to visit their father two months in each year. It appeared that there had not been as yet an actual violation of the order, but that counsel for the wife had given notice that she would not obey it in view of the order of the court of the other State (Maine) in the divorce case awarding her the custody of the children. Although the New Jersey Court of Chancery denies the application to punish for contempt, the tenor of its reasoning is that if actual disobedience took place the punishment would be directed. If the mother had the children with her in Maine, and she chose to "sit tight," it is not improbable that any such decree of the New Jersey court would prove *brutum fulmen*.

As is quite customary in interstate matrimonial complications, the peculiar and isolated policy of New York divorce law enters as a factor. The following is from the opinion:

"One naturally asks why the husband, having been notified of the application, did not appear at least by counsel. The case presents a somewhat singular situation. Mr. Dixon is domiciled in New York. By the law of that state he may, in so far as the proceeding is a divorce proceeding, disregard notice served upon him in New York. The Maine decree will not in New York be treated as severing the marriage bond. The application for the custody of the children was made not as an independent proceeding, but in the course of the proceeding for divorce. If he appears to contest it, is or is not such appearance to be treated as an appearance in the cause, and will it give validity in New York to an adjudication which would otherwise be disregarded by the courts of that state? No doubt under advice of counsel, he was unwilling to do that which would raise such a question."

Last year a bill was introduced in the New York Legislature providing for the entire abrogation of substituted service of process in actions for divorce. The object obviously was to render the policy of this State consistent in itself. Even if it be conceded that this method of obviating an anomaly was proper, the bill went too far, because the courts of New York do recognize a divorce granted in another State upon service by publication, if such other state has been the matri-

monial domicile of the parties. We believe that the bill failed and properly so from every point of view, because of its ultra character. We understand that a bill has been introduced in the present Legislature providing that, under certain conditions and restrictions, full faith and credit shall be given by the courts of New York to decrees for divorce by the courts of other States rendered upon substituted service upon the defendant, although there has been no matrimonial domicile in State of the forum. Such an amendment to the New York law would obligate a defendant in New York at his peril to appear in such a suit as *Dixon v. Dixon* in the Maine Court. The proposed amendment would materially assimilate the New York law of divorce to that of a majority of the States of the Union.

The Influence of the Mind on Longevity

By T. D. Crothers, M. D., Hartford, Conn.

In the reminiscences of the late Sir Andrew Clark of London, England, he asserts that he never treated a person over sixty years of age who was profoundly pessimistic that recovered.

He argued from this that the continuance of life and the prevention of disease in old age was more largely due to the mental condition than to many other factors.

This is within the observation of everyone, and recent research shows that the mind, or the mental forces of the body when active are great antagonistic powers to degeneration and death. A man in the last stages of pneumonia, or other diseases who has bouyant confidence of recovery will be far more likely to live, than one who has lost all hope for the future.

There are many reasons for believing that we carry around with us great reserve powers and unknown energies which are seldom used only with great occasions, and that in old age appeal to these unused powers may give a certain vigor entirely unexpected which lengthens out life and practically overcomes disease.

Spinoza said that optimism and long life were synonymous and pessimism decay and early death were equally closely allied. Introspection and reflection of present conditions are always

depressing, but where the mind is lifted above the present and takes no account of the ills of today, there is vigor and health.

The very old men are often persons young in years, whose age and decline have been precipitated by dread anticipation, harassing cares and doubt. The troubles and sorrows they are expecting are brought home to them and become materialistic realities.

It is impossible to point out the exact effect of depressing thoughts on the feeble energies that comes from forebodings. We note the difference in health and vigor, between one who is deeply pessimistic and the other who lives in the sunshine of hope and faith.

The oft repeated statement that one cannot rise above the surroundings and take optimistic views where the conditions are so adverse, is a grievous error.

One has simply to realize some of the hidden forces which he carries about with him, and how far he can make them contribute to his present and future life, and then make the effort, and the deep pessimism will disappear, from the continuous desire, and the effort to rise above it.

The best work in science, literature and art, is done by persons who realize that there are no limitations to mental force and power, but while the body becomes weak and worn with age the mind may grow brighter and stronger, from new conceptions and newer views.

The man past sixty and from that on to eighty ought to be at his very best, because there is no experiment in life then. It is a rational persistent effort followed by success. He has attained a position where he can use all his powers to the best advantage.

He can see in the future what was cloudy before. He can overcome obstacles that were formidable with little or no effort. As the physical forces decline the mental forces should come into greater activity. One will offset the other.

In this as in everything else, there must be an effort and a consciousness of success, and a faith that grows brighter with each succeeding day. An optimistic old man is reaching out to the ideal and becoming more and more perfected. If he did not have a great load of heredity he would reach his allotted period of 100 years, and the best years of his life would be the last ones.

There is no theory in this. It is sustained by a great variety of facts which fortunately are becoming more and more realized as the years go by.

A REMARKABLE JUDICIAL DELIVERANCE

Rough on the Squatter But Rougher on the Court

*Tinkering With the Law No Part of the Function of a Court.
Judge Jeremiah H. Black Writes an Opinion With a Two-Edged Sword—Suppressed in the Official Report, But Good Enough Law for The Bar.*

TO THE BAR:

I enclose you, herewith, the dissenting opinion of Judge Jeremiah S. Black, then one of the judges of the Supreme Court of Pennsylvania, in the case of *Hole vs. Rittenhouse*. I think you will agree with me that this is a remarkable production, and worthy of wide publication. The case is officially reported in 25 Pa. St., 491 (1 Casey, 4491); but the official report does not contain the dissenting opinion. Perhaps the reason for this omission will be apparent to any one who will read Judge Black's production. The dissenting opinion is taken from 1 *Pittsburg Reports*, page 284; and is also reported in 2 *Philadelphia Reports*, page 411.

Yours very truly,

J. B. S.

HALE v. RITTENHOUSE

DISSENTING OPINION BY JUDGE BLACK.

This case is so important in its principle, so curious in its history, and so alarming in its result, that I feel bound to put on record a brief statement of my own views.

The plaintiff had three tracts of land regularly surveyed, adjoining one another. The Commonwealth was paid by the original warrantees for every acre included within them, and the title had passed from hand to hand several times, and

plaintiff and those from whom he purchased, had valuable improvements, consisting of houses, barns, arable fields, orchards through more than one generation. On two of these tracts the and meadows. Of the third tract he had no actual occupancy. But for more than half a century he had paid taxes on all of them, except when on two or three occasions there was an omission to assess him. He was resting securely on the title which he had bought and paid for, and which nobody had ever disputed, when Barney Hole, the nominal defendant, a man totally irresponsible, and altogether worthless in every sense of the word, impudently thrust himself upon one of the tracts, and without pretending to claim it, began to make as free with it as if it had been his own. The counsel who appeared for him, confessed, at the argument, that he had no interest in the question, and that he had been put on the land to provoke ejection by others, who are to have the benefit of any success with which this trick may be attended. He left after this suit was brought, and then the plaintiff might have dropped it, but he did not. The title which Barney Hole, or his anonymous backers now set up, and on which they hope to take from the plaintiff a large portion of the earnings of his own and his father's life, is this: A survey in the name of John Graff, which is older than either of the plaintiffs, lies afool of them, and it was on the interference that Barney Hole sat down. This naked and solitary fact, that the plaintiff's surveys were interfered with by another, which was older, is absolutely all that was shown on the last trial. That is the whole extent of the defense. John Graff never took possession of his tract, nor any part of it. He never paid a cent of taxes. He never claimed the land in dispute. He does not claim it now, nor has he authorized anybody else to claim it for him. Barney Hole and his employers seem to know nothing of him except his name. On the other hand, the plaintiff's survey was made under a regular warrant, was legally returned and honestly paid for. He has been in possession under it, and paid taxes upon it so long that the memory of man scarcely runneth to the contrary. I devoutly believe that he cannot be despoiled of it now on any evidence which this record discloses, without doing him a gross wrong.

But though he has the manifest honesty of the case with him, the judgment could not be affirmed, unless the law also were with him. Let us see how that is:

In the first place, I think this defendant, being a mere in-

trader, had no right to set up a title of any kind in a third person. If he can do so, then every trespasser can demand of the injured party that he shall show a perfect title against all the world before he can recover for any wrong to his property. With profound deference to the better judgment of the majority, I am clear that a man whose title to his land happens to be defective is not at the mercy of every dishonest stranger who may cast a covetous eye upon it. If I ascertain that my neighbor has lost a link in his chain of title so long ago that he cannot now supply it, and thereupon I get some venal tool to take possession and provoke ejectment, so that I may show the defect, and keep land which is not mine, I do a thing as repugnant to the rule of law as it is inconsistent with common honesty. It would shock our sense of justice to allow a person who goes in, like this defendant, to set up an outstanding title, which the owner of it never asserted, nor intended to assert, and which he was probably paid long ago for not asserting. There is nothing in the books that gives the smallest countenance to such conduct. The direct contrary has always been held. In *Hunter v. Cochran*, 3 Barr 105, the broad doctrine is laid down, that no defendant in ejectment can set up an outstanding title, if it be derelict, abandoned, or barred by the statute: *Foust v. Ross*, 1 W. & S. 501, is full to the point. It decides, 1. That an intruder cannot set up an abandoned title. and 2. That the neglect of the owner to look after his title, and pay taxes for twenty-one years, is an abandonment. Here is a self-confessed intruder, who desires to set up a title that has been derelict and utterly abandoned for more than twice twenty-one years. Should he be permitted to do so in the teeth of all the authorities and in the face of the plain reason and justice which forbid it? The Judge of the Common Pleas thought, not and I thought he was right. It seems we were both mistaken.

But apart from all this, I would, if I could, protect the plaintiff from this wrong by the Statute of Limitations. I think John Graff himself, or his alienee, could not legally recover the land in dispute—at least that part of it within the two tracts which are improved.

The plaintiff has not cultivated or enclosed the interference, nor any part of it, but he has an official survey which embraces it and his residence is on the survey. There it has been for a period much longer than twenty-one years. Why should he not hold it? The only answer is that though he lived for so long a time on his farm, yet he did not live on the very part

of it with which the other survey interfered. This would be a sound argument in England, but it is not the law of Pennsylvania, nor probably of any other American state. The statute would be useless here if it did not protect unenclosed woodland as well as cultivated grounds. Accordingly it has been universally held by this Court that one who goes into possession under color of title, with boundaries marked, is in, not the constructive, but the actual possession of the whole tract, and if he continues so to occupy it for twenty-one years he acquires a good title to all within the lines of his colorable claim, no matter how small a portion of it he may have had under his feet. This principle was fully discussed and settled in *Heiser v. Riehle*, 7 Watts 35; *Criswell v. Altemus*, 7 Id. 581; *Bell v. Hartley*, 4 W. & S. 32; *Hoey v. Furman*, 1 Barr 95; *Porter v. McGinnis*, 1 Id. 413; *Fitch v. Mann*, 8 Id. 503, not to speak of the many older cases in which it has been affirmed. It was acknowledged by a majority of this Court to be the law so lately as the month of September, 1854, not more than fifteen months ago, in the case of *Ament's Ex'rs. v. Wolf*, 9 Casey 331.

These cases do assuredly decide, if anything ever was decided, that an office right is always good as color of title—that one who enters under such title is in possession of the unenclosed woodland within its lines as much as he is of the cultivated fields—that he has the whole tract by our law, just as he would have the enclosed part by the law of England—that if there were a better title to the woodland within the lines, the constructive possession of the true owner is ousted—that by such entry the occupant acquires title against all the world, but the *bona fide* owner of a better title—that he may maintain ejectment or trespass against an intruder, and after twenty-one years will be protected against the owner himself.

These simple and long established rules should be decisive of the case. The plaintiff had an office right—a warrant regular on its face, and a survey legally executed and returned. This did not give him title to the interference. But it gave him color of title to all the land within his lines. On the day that he entered he had a right, good against men like Barney Hole, and after the expiration of twenty-one years, his right was good against John Graff also. Under such circumstances the statute ought to protect him, and if it does not protect him it ought to be repealed. If it does not give repose to him, there is no reason why other men should have the advantage of it.

But even if there were no statute of limitations, the lapse

of time, accompanied by the facts of this case, would raise a conclusive presumption in favor of the plaintiff. It often happens that surveys interfere with each other, sometimes by mistake of the officer, and sometimes with the consent of the elder warrantee. It is not at all uncommon for the junior survey to be the better title, in consequence of some contract or other of the adverse party, which estops him from claiming the interference. Now take this as a part of our daily experience, and apply it to a case where the elder warrantee has not shown himself for sixty years. He takes no possession, pays no taxes, asserts no right, and performs no duty of an owner. On the other hand, the junior warrantee, and those claiming under him, enter immediately upon their tract, to build, and plant, and sow, and pay the taxes. Successive generations live and die upon it. The whole of it is repeatedly bought and sold and paid for in good faith. The extent of the claim embracing the interference, is not only seen from the marks on the ground, which anyone can trace, but from the records of the land office, the recorder of deeds, the register's office, the Orphans' Court, the county commissioners, and on every assessment of taxes, or at least most of them, for half a century. After all this, would any court presume a conveyance of the interest which the elder warrantee had in the interference? Such presumption is required by all analogy, and in ninety nine cases out of a hundred, it would accord with the truth. It would be quite as just, and more natural than the similar presumption made in *Strimpfler v. Roberts*, 6 Harris 283. But here the elder warrantee makes no claim. John Graff is willing to abide by the contract which the law presumes him to have made. Barney Hole, an intruder and a stranger, is to have the benefit of a title, which Graff, while he was living, and his descendants since his death, have always been too honest to assert.

But there is no need of resorting to fundamental principles analogies and presumptions. The very question now before us has been repeatedly and solemnly ruled. In *Kite v. Brown*, 5 Barr 291; *Waggoner v. Hastings*, 5 Id 300; *Lauderbaugh v. Seigle*, 5 Id. 490; *Mann v. Fitch*, 9 Id 503; *Billheimer v. Steele*; in each of these cases, this precise point came directly up, was argued by able counsel, was carefully considered and decided. The reasons of the judgment were given at length, and on every occasion were unanimously agreed to by the judges. The plaintiff's land cannot be taken away from him without overturning the rule established and defined in these cases. It is this: that

where two surveys interfere, and the owner of the junior survey enters upon any part of his tract, he is in the actual possession of all the land within his lines, and such actual possession ousts the other party from his constructive possession of the interference unless he too enters upon his tract and thus restores the equilibrium of possession. Every one of the cases was a claim of the junior warranty to be protected by the statute under an occupancy of twenty-one years, without showing any enclosure of the interference, and in every one of them it was held that he was protected. This doctrine was universally acquiesced in. It had long ago been declared by Judge Harmon, in *Hockenbury v. Snider*, 2 W. & S. 240, to have been uniformly held as the law of Pennsylvania. It commended itself by its simplicity, its justice, and its consistency with all the principles previously determined. In our whole system of land law, there was no rule of property that seemed more firmly settled. No doubt thousands have invested their money and their labor on the faith of it. To overthrow it now is to prove that nothing is safe.

How it was regarded by the profession is shown in the way in which this case has been conducted. When it was first tried the Court below gave the plaintiff all of the John Graff tract which was interfered with by the whole three of the plaintiff's surveys. A writ of error was taken for the sole purpose of getting a decision here, that the plaintiff could not have that one on which he had no improvements. That he was entitled to the part interfered with by the other two on which he lived was not denied. Not a word was uttered in argument either for or against the rule settled in *Kite v. Brown*, and the other cases. The counsel for the plaintiff in error knew the whole ground very well, for he was one of the foremost men in the state; but he could not then be tempted to make the point which has since been so successful. Even on the last argument he barely raised it, and did not press it. I am thoroughly satisfied that no judicial legislation on the subject can have the approbation of his judgment, and his opinions are a fair sample of what is thought by the best men in the profession everywhere.

If the rule in *Kite v. Brown* had been opposed by other decisions of this Court, there might be reasons for declaring it abolished. But there is not a solitary case, old or recent, that impugns it in the least. It is true, and it has been uniformly so held, that a person who occupies land adjoining to a survey,

and who without authority and of his own head, marks his lines over on his neighbor's tract, acquires thereby no possession and no rights. Such were the cases of *Cluggage v. Duncan*, 1 S. & R. 111; *Burns v. Swift*, 2 Id. 436; *Altemus v. Trimble*, 9 Barr 232; *Wright v. Guiger*, 9 Watts 172, and some others. No one has ever been so extravagant as to suppose that the making of lines upon another's land without any pretence of authority from the Commonwealth was more or less than a trespass. A person who acts thus is a naked wrongdoer in no respect better than Barney Hole himself. But how any human ingenuity can confound such a case in principle with the case of one official survey interfering with another, passes my comprehension. An official survey is always color of title at least. Lines made by a trespasser are not color of title, and that makes all the difference in the world. But, even if the distinction were not as broad and palpable as it is, is it not enough that the law has made a distinction which all authority recognizes and everybody acts upon? I think so.

I could say much by way of proving that the rule I contend for is wholesome in its operation, and that no other rule equally just and simple can be substituted in its place. But that is surely not necessary. When a principle of law is established by a long series of decisions without a single case on the other side to carry it out in plain good faith is as sacred a duty as any judge has to perform. His own notion that it ought to be otherwise is not entitled to a moment's consideration. It is no part of our office to tinker at the law, and patch it up with new materials of our own making. Suitors are entitled to it just as it is. Bad laws can be borne, but the *jus vagum aut incertum*—the law that shifts and changes every time it passes through the courts, is as sore an evil and as heavy a curse as any people can suffer; and no people who are fitted for self-government will suffer it long. Even a legislator, if he is wise and thoughtful, will make no change which is not absolutely necessary. Legislative changes are retrospective and disturb nothing that is past. But judge-made laws sweep away all the rights which have been acquired on the faith of previous rules. For such wrongs even the legislature can furnish no redress. When the scales of justice are shaken by the hands that hold them here, there is no power elsewhere to adjust them. A simple man, who has invested his money in the purchase of a title solemnly pronounced indefeasible in half a dozen cases decided by the highest tribunal of the state, may wake up from his dream

of security to find himself ruined by a contrary ruling of the very same question.

The judgment now about to be given is one of "death's doings." No one can doubt that if Judge Gibson and Judge Coulter had lived, the plaintiff could not have been thus deprived of his prosperity; and thousands of other men would have been saved from the eminent danger to which they are now exposed of losing the home they have labored and paid for. But they are dead, and the law which should have protected those sacred rights has died with them. It is a melancholy reflection that the property of a citizen should be held by a tenure so frail. But "new lords, new laws," is the order of the day. Hereafter if any man be offered a title which a Supreme Court has decided to be good, let him not buy if the judges who made the decision are dead; if they are living let him get an insurance on their lives, for ye know not what a day or an hour may bring forth.

The majority of this Court changes on the average once every nine years, without counting the chances of death and resignation. If each new set of judges shall consider themselves at liberty to overthrow the doctrines of their predecessors, our system of jurisprudence (if system it may be called) would be the most fickle, uncertain and vicious that the civilized world ever saw. A French constitution, or a South American republic, or a Mexican administration would be an immortal thing in comparison to the short lived principles of Pennsylvania law. The rules of property which ought to be as steadfast as the hills, will become as unstable as the waves. To avoid this great calamity I know of no recourse but that of *stare decisis*. I claim nothing for the great men who have gone before us on the score of their marked and manifest superiority. But I would stand by their decisions, because they have passed into the law and become a part of it—have been relied and acted on—and rights have grown up under them which it is unjust and cruel to take.

DID AS HE WAS TOLD.—"Did you present your account to the defendant?" inquired a lawyer of his client.

"I did, sir."

"And what did he say?"

"He told me to go to the devil."

"And what did you do then?"

"Why, then, I came to you."—Wit and and Wisdom.

West Virginia Court of Appeals

Decisions Handed Down at the Last Term

REPORTED ESPECIALLY FOR THE BAR

Appearing Here for the First Time in Print

REPUBLICAN EXECUTIVE COMMITTEE v. COUNTY COURT

In Mandamus. Writ awarded.

Miller, Judge.

SYLLABUS.

1. In a proceeding instituted before a state central committee of a political party, begun by one of the two contending county committees against the other, service of notice or process upon the chairman and secretary of the contestee committee, should be regarded as sufficient to give such state central committee jurisdiction of the parties to the controversy.

2. A case in which the principles announced in *Bogges v. Buxton*, clerk, ———— W. Va. ———— and particularly in points four and five of the syllabus, are approved and applied.

Where there are two executive committees in a county, each claiming to be the regular and lawful county committee of a particular political party, and the question of such regularity has been submitted to and heard and determined by the state central committee for such party, being the highest political authority of the party in the state, and after due notice served on the chairman and secretary of the contestee committee, no state convention intervening with authority to supervise or overrule it, the judgment and findings of such state committee that one of said contesting committees is, and the other is not, the regular and legally constituted county committee for such party, will be treated as conclusive of that matter when afterwards brought in question or involved in a judicial proceeding, whether such contestee committee appeared and submitted the merits of its claim to the judgment of such state committee or not.

STATE v. MATHEWS ET ALS.
and
RICHARDS ET ALS. v. MONTGOMERY ET ALS.
Fayette County. Reversed.
Williams, Judge.

SYLLABUS.

1. When land is sold for delinquent taxes, assessed thereon in the name of the owner of a freehold estate therein less than the fee, and is purchased by the state and not redeemed within one year thereafter, the state thereby acquires not only the estate of the person assessed with the taxes but also the real estate of the reversioner or remainderman.

2. A sale and conveyance of the state's land in the manner provided by chapter 105, Code 1906, creates a new title and estops the state from again selling the same land unless there is a forfeiture of the new title.

3. Section 19 of chapter 105, Code 1906, is retroactive and curative. It is designed to validate, and to make good, the titles of purchasers of the state's lands which they have acquired through defective proceedings, or deeds, under chapter 105. Said section has the force of a legislative grant of the state's land to all such purchasers thereof prior to the time when chapter 42, Acts 1905, took effect, and who have, since their purchase, kept the taxes paid on said land.

4. Said section operates to vest in such purchasers, who have paid all the purchase money, all the titles the state had in the land at the date of the sale or conveyance, notwithstanding the proceeding to sell the land may not have been brought against the person, or persons, having the right of redemption.

5. The words, "since the ninth day of April one thousand eight hundred and seventy-three," occurring in section 39 of chapter 31, Code 1906, mean all time after the 9th of April, 1873.

6. One having neither title to, nor right to redeem, land can not maintain a suit in equity respecting same.

STATE v. GUM.
Pocahontas County. Affirmed.
Miller, Judge.

SYLLABUS.

If an attempted arrest be unlawful the party sought to be arrested may use such reasonable force, proportioned to the injury attempted upon him, as is necessary to effect his escape, but no more; and he can not do this by using or offering to use a deadly weapon, if he has no reason to apprehend a greater injury than a mere unlawful arrest. Instructions to the jury not so limited were properly refused.

TRUSTEES OF BROADBUS INSTITUTE v. SIRE.
Harrison County. Judgment Reversed and Re-entered for
Larger Amount.

Poffenbarger, Judge.

SYLLABUS.

1. In the transfer of a chose in action by an assignment 'without recourse,' there is an implied warranty by the assignor against loss to the assignee by entire or partial failure of consideration.

2. In case of a breach of such warranty, an assignee may sue a remote assignor, by virtue of sec. 15 of chap. 99 of the Code of 1896.

3. If the failure of consideration is partial only, causing loss of part of the debt, the statute of limitations does not begin to run, until such failure and the extent thereof have been determined judicially or otherwise.

4. Loss by an assignee of a portion of a bond, given by a building and loan association, for the supposed ultimate value of certain of its shares, by reason of a great excess in the amount of the bond above the actual value of the shares, at the date of the execution thereof, is attributed to failure of consideration, in an action by the assignee against the assignor, not insolvency of the association, the latter being regarded in law as a mere remote and antecedent cause, superinducing the real, proximate cause of loss between the parties to the assignment.

STATE v. HOTEL MCCREERY COMPANY.

Summers County. Judgment Reversed.
Braunon, Judge.

SYLLABUS.

1. A writ of error lies for the state from the Supreme Court in prosecutions of offenses under provisions of chapter 32 of the Code relating to licenses, since such cases relate to public revenue.

2. The Supreme Court of Appeals has jurisdiction of a writ of error for the state from a judgment of a circuit court for defendant a corporation, upon indictment for selling liquor under a license issued to it in violation of sec. 10, ch. 32, Acts of 1907, forbidding license to a corporation

A license to a corporation to sell intoxicating liquors is void and no defense upon an indictment for selling without license, though the license tax has been paid.

4. A license to sell intoxicating liquors issued to Hotel McCreery Company imports a license to a corporation and is void on its face. Also evidence is admissible to show it to be a license to a corporation.

SHIRES v. BOGGESS.

Monroe County. Reversed, Verdict Set Aside, and Remanded.
Robinson, President.

SYLLABUS.

1. The defense of ~~son~~ assault ~~demon~~ne must be pleaded specially, and cannot avail under the general issue, in an action for damages from an assault and battery.

2. Matters in justification of an assault and battery as defense of a suit for damages, must be pleaded specially. They can not be given in evidence under the general issue.

3. If a proper plea averring matters which legally justify the assault and battery made the basis of an action for damages is not replied to or controverted, a valid defense stands confessed, and no issue exists.

4. It is the established law of this state that a judgment based on trial without joinder of issue is erroneous and reversible from want of issue alone.

STATE v. AB. WILLIAMS

Braxton County Reversed and Remanded.

Williams, Judge.

SYLLABUS.

1. Under a count for simple larceny it is admissible to prove that the property was obtained by false pretense, with intent to defraud.

2. One who obtains possession of property upon the pretense of buying it for cash, at an agreed price, for the purpose of the payment of a just debt then due by the owner, equal to, or greater in amount than the price of the property, is not guilty of a statutory crime.

3. The procuring of the payment of a just debt already due, by false pretenses, is not an indictable offense.

STATE v. DAVIS.

Barbour County. Judgment Affirmed.

Brannon, Judge.

SYLLABUS.

1. An indictment against a druggist for the sale of intoxicating liquor is not bad for not naming the person to whom the sale was made.

2. An indictment against a druggist for the sale of intoxicating liquor is not bad for not specifying the day of sale. If it allege it to be within one year before the finding of the indictment.

3. A sale of intoxicating liquor by a druggist to a physician, without the prescription required by law is unlawful.

STATE v. DAVIS.

Barbour County. Reversed and Remanded.

Williams, Judge

SYLLABUS.

1. The written prescriptions of practicing physicians on which a licensed druggist has made sales of intoxicating liquors, and which he has preserved in his possession, as the statute directs, are not his private papers and documents within the meaning of the constitutional guaranty against compulsory self incrimination.

2. Such prescriptions are quasi public documents, and the constitutional privilege is not violated by compelling a druggist who stands indicted for selling spirituous liquors, to produce them in court in order that they may be used as evidence against him on his trial.

3. A licensed druggist can not sell intoxicating liquor to a practicing physician except upon the written prescription of a practicing physician in good standing in his profession, and not of intemperate habits.

4. Such prescription must state substantially the following, viz: (1) the name of the person for whom prescribed; (2) the kind and quantity of liquor; (3) that it is absolutely necessary as a medicine for such person; and (4) that it is not to be used as a beverage.

5. A written order addressed to a licensed druggist and signed by a practicing physician, in the following words viz: "Send me OJ spts. whiskey and oblige. 12-12-09," is not a lawful prescription for intoxicating liquor, and a sale made thereon is unlawful.

6. When a sale of intoxicating liquors is proven to have been made by a licensed druggist, it is presumed to have been unlawfully made, and the burden is then cast upon him to rebut such presumption.

7. The verdict of a jury will not be reversed on account of the admission of improper testimony or the giving of an erroneous instruction when it clearly appears that, if such evidence had been excluded and such instruction refused, the result could not thereby have been changed. Such error is not prejudicial

8. In order to warrant the imposition of the increased penalty imposed for a second conviction by section 6 of chapter 32. Code 1906, a former conviction must have been alleged in the indictment, and also proven. The court can not take judicial knowledge of a former conviction for the purpose of imposing the penalty prescribed for a second conviction.

THOMAS v. HIGGS & CALDERWOOD.
Kanawha County. Judgment Reversed. Writ of Scire Facias
Quashed.

Miller, Judge.

SYLLABUS.

1. The general rule is that statutes are, *prima facie*, to be construed as prospective and not retrospective in operation.

2. This rule is applicable to statutes remedial in nature, and applies also to statutes of limitations unless by express command or by necessary and unavoidable implication a different construction is required.

3. Chapter 45, Acts of 1897, amending section 131, Ch. 50 Code, giving ten years instead of three years from the date of the entry of a judgment of a justice, or the date of the last execution thereon, within which execution may issue, does not apply to judgments of justices of the peace then dormant for want of execution thereon within three years from the date of entry thereof.

4. The filing in the clerk's office of a circuit court on July 3 1901, of the transcript of the judgment of a justice pronounced December 14, 1893, and on which no execution had previously been issued, and causing execution to be then issued thereon by such clerk, was unlawful, and did not, by virtue of the amendment of 1897 of said section 131, Ch. 50, Code or otherwise, operate to revive said judgment or thereby make it the judgment of said court, as of that date, or so as to fix a new date from which the statute of limitations should begin to run.

RODGERS v. BAILEY

Fayette County. Reversed, Verdict Set Aside, and New
Trial Awarded.

Robinson, President.

1. In an action by a wife seeking damages for loss of her means of support from the unlawful sale of intoxicating liquors to her husband, evidence as to the number and age of her children is irrelevant and not properly admissible.

2. The admission of irrelevant testimony, likely to enhance damages, is reversible error unless it plainly appears that the verdict is not in excess of the damages proved.

3. In proving compensatory damages, the standard of measure by which the amount may be ascertained must be fixed with reasonable certainty, otherwise a verdict is not supported and must be set aside.

4. A verdict in excess of damages proved should be set aside upon motion except when the evidence affords a definite basis for a remittitur and the same is entered.

SOMMERS, ET ALS. v. BENNETT, ET ALS.

Marion County. Reversed and Remanded.

Brannon, J., Absent. Miller Judge.

SYLLABUS.

1. A case in which the rules and principles announced in *Gapen v. Gapen*, 41 W. Va. 422; *Cecil v. Clark*, 44 W. Va. 659; *Parker v. Brest*, 45 W. Va. 399; *Justice v. Lawson*, 46 W. Va. 163; *Cochran v. Cochran*, 55 W. Va. 178; *Reed v. Bachman*, 61 W. Va. 453; and *Russell v. Tennant*, 63 W. Va. 623, governing where title to land is claimed by one co-tenant against another, or by a trustee of an express trust against his cestui que trust, by reason of his purchase of the land at a tax sale, and of outstanding or conflicting titles thereto, and by occupation, improvements, and the taking and appropriation to his exclusive use of the rents, profits, are properly applicable.

2. In a suit by one co-tenant against another co-tenant of land acquired and held for sale and profit for an accounting of the proceeds of sales made, and of rents, issues and profits, the statute of limitations begin to run from the time plaintiff had right to demand payment.

3. Where land so held has been leased for oil and gas purposes by a co-tenant or trustee, without the consent of the other co-tenant or the cestui que trust, but such lease is subsequently ratified in a suit for an accounting of rents and profits, the accounting should include all money received by the lessor co-tenant or trustee for such lease, by way of bonus money or commutation money, and from royalty, oil and gas rentals, or otherwise, accruing under such lease.

STALNAKER v. JANES.

Barbour County. Decree Affirmed.

Poffenbarger, Judge.

1. An expression of opinion by the seller of shares of non-dividend bearing stock, in a mining corporation as to what dividends it will pay and the time of payment thereof accompanied by the general and indefinite statement that he had "inside information," does not constitute a warranty nor ground for rescission of the contract on the failure of the corporation to pay dividends on the stock within the time specified.

2. A misrepresentation of fact, made in the negotiation of a sale of personal property, not relied upon by the purchaser, constitutes no ground for rescission.

3. The deposition of a party to a cause, examined as a witness cannot be rejected merely because of his refusal to answer questions, the relevancy and materiality of the subject matter of which

are doubtful, when no process to compel him to answer the same has been taken or applied for. By submitting his cause without having so tested the propriety of the questions, the opposite party waives the failure of duty on the part of the witness, if any there was.

4. An assignment of error, founded upon the overruling of an objection to the reading of a deposition on the ground of insufficiency of the notice in respect to the time and place of the taking of the same, which objection admits notice thereof and is also opposed by record evidence thereof, is untenable in the absence of proof of uncertainty in respect to the time and place, shown by production of a copy of the notice or otherwise, it being presumed that its terms were reasonably certain.

DULIN v. OHIO RIVER RAILROAD COMPANY.

Wood County. Judgment Reversed.

Brannon, Judge.

SYLLABUS.

1. A land owner can maintain ejectment against a railroad company for land of which it has taken possession and on which it has constructed its railroad, without his consent or acquiescence.

2. A land owner who sees a railroad company enter upon his land for the purpose of constructing its road, and sees it construct and use its road, and makes no objection, but allows the company to so construct and operate, cannot later maintain ejectment to oust the company.

3. Possession of an abutting owner of a part of land over which a railroad company has a right of way and is operating its road is not in law adverse to the company under the statute of limitations and will not confer title on such occupant.

4. If one purchase a tract of land with notice that a railroad company has an unrecorded deed from the same grantor conveying a parcel of the tract for right of way for its railroad, the title of such purchaser to the land covered by such right of way deed is subordinate to the company's right, and possession and use of such purchaser of a part of the right of way land, while the company is operating its railroad by its track laid upon another part of such right of way land is not adverse to the company under the statute of limitations.

DeFROSCIA v. THE NORFOLK AND WESTERN RY. CO.

McDowell County. Affirmed.

Robinson, President.

SYLLABUS.

A bill of exceptions made in vacation must be certified in order duly entered of record as required by statute, otherwise it does not become a part of the record and avails nothing on writ of error.

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